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FILED
MAR 19 1956
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1955.

No. 773

D. L. JOLLY, SR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, D. L. Jolly, Sr., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

Neither the District Court nor the Court of Appeals wrote an Opinion.

The order of the Court of Appeals, affirming the judgment of the District Court, reads as follows:

> "Before McAllister, Miller and Steward, Circuit Judges.
>
> "A jury found the appellant guilty upon four counts of an indictment charging attempts to evade federal income taxes in violation of 26 U. S. C., Sec. 145 (b) (1952 Ed.). Of theretofore unblemished reputation, and a leader in his community, the appellant, upon conviction, was ordered to pay a $40,000 fine and sentenced to a term of ten years in prison.
>
> "Sixteen grounds for reversal are asserted by able counsel on this appeal. We find merit in none of them. There was abundant evidence to support the jury's verdict. No prejudicial error was committed in the admission of evidence, nor in the court's refusal to give certain instructions requested by the appellant. **While it would have been preferable for the trial judge to have included in his instructions an explicit recapitulation of each of the appellant's various theories of defense, his omission to do so did not, in our opinion, constitute prejudicial error in this case.** The instructions as given were otherwise complete and free from error. Nor did the court err in overruling the motion for a mistrial and the subsequent motion for a new trial.
>
> "The sentence imposed by the trial judge was, in our opinion, extremely severe. Since it was within his statutory authority, however, we are without power to review it.
>
> "The judgment of the district court is affirmed." (Emphasis ours.)

JURISDICTION.

The order of the Court of Appeals affirming the judgment was entered January 10, 1956, and the petition for a rehearing was denied by order entered February 18, 1956. This petition, accompanied by certified transcript of the record, as required by Rule 21, is filed with the Clerk within 30 days after the entry of the judgment affirming the conviction. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the Judge fairly submitted the issues to the jury in that:

(a) The Court submitted in detail the theories of the Government, and the law applicable thereto, without charging the converse of these theories.

(b) The Court nowhere stated the theory of petitioner but ignored his claimed defenses which were supported by evidence before the jury.

(c) The court in its summation of the evidence emphasized at length the contentions of the Government but ignored the exculpatory evidence on the same points offered by accused.

(d) The charge was inconsistent and misleading.

(e) In narrating the Government contentions to the jury the Court assumed as a fact material matters not in evidence.

2. Whether in a case where the principal issue was a claimed diversion of corporate funds to his own use by petitioner the Court erred in refusing on request to charge the jury that taxable gain is conditioned upon:

(a) The presence of a claim of right to the alleged gain, and

(b) The absence of a definite unconditional obligation to repay or return that which would otherwise constitute a gain, there being direct evidence that petitioner did not claim as of right the funds involved but always recognized his obligation to repay or return them to the corporations and was solvent and able to so do.

3. Whether the trial judge in his instructions invaded the province of the jury.

4. Whether the Court erred in refusing on request to instruct the jury that petitioner in the absence of evidence to the contrary was justified in assuming that subordinate officials of his corporations would comply with instructions he gave them to charge against his account all funds withdrawn by him from the corporations.

5. Whether the defendant was denied a fair and impartial trial.

STATEMENT.

The record consists of five printed volumes comprising the appendices to the briefs in the Court of Appeals. The petitioner's appendix consists of four volumes and is numbered 1a through 1239a, and respondent's appendix is in one volume, numbered 1b to 48b.

On May 26, 1953, a six-count indictment was returned in the United States District Court for the Middle District of Tennessee, Nashville Division. The first four counts alleged violations of 26 U. S. C., Sec. 145 (b), and counts five and six charged violations of 18 U. S. C., Sec. 287.

The fifth count was dismissed by the District Court at Nashville, and thereafter the cause was transferred to the

Western District of Tennessee, Western Division, for trial (Appellant's Appendix, page 8a).

Petitioner was convicted on the first four counts of the indictment charging violations of 26 U. S. C., Sec. 145 (b), and acquitted on the sixth count charging a violation of 18 U. S. C., Sec. 287.

The first four counts of the indictment cover the calendar years 1946, 1947, 1948 and 1949 (App. 4a-6a).[1]

Roughly speaking, the aggregate claimed deficiency for these four years was $49,000.00 (App. 815a). Petitioner for these four years paid taxes totalling $82,147.26 (App. 4a-6a). In addition, the Jolly Cab Company and the Jolly Motor Livery Corporation, largely owned and controlled by petitioner, paid during the four-year period covered by the indictment, taxes in the approximate amount of $100,000.00, making the total tax payments by petitioner and his corporations a sum in excess of $180,000.00 (App. 33a). The Jolly Cab Company conducted taxicab operations in the City of Memphis, the Jolly Motor Livery Corporation rented cars and trucks, and the Jolly Maintenance Service did automotive repair work, including engine repairs, but not body work (App. 339a).

These concerns employed several hundred persons and the extent of their operations will appear from the examination of petitioner's tax returns for the calendar years 1946, 1947, 1948 and 1949, and for the fiscal years of the corporations involved in this proceeding. The gross receipts of the Jolly Maintenance Service for 1946 amount to $315,103.58; for 1947, $358,380.18; for 1948, $356,137.95; and for 1949, $299,656.29. The gross receipts of the Jolly Cab Company for the fiscal years involved were $755,563.85,

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[1] Except as otherwise indicated, record citations refer to the appendix to Petitioner's Brief in the Court of Appeals.

$836,176.05, $806,321.60, and $596,575.75. The gross receipts of the Jolly Motor Livery Corporation for three of the fiscal years involved were $348,416.25, $443,259.27, and $487,803.36 (App. 819a-821a). One of the years for Jolly Motor Livery seems to have been omitted from the testimony of Internal Revenue Agent Norris (App. 819a-823a).

The business of these concerns comprised a multitude of small collections and transactions involving sales of gasoline, repairs on automobiles, taxicab fares, and similar matters; and the total gross income for the four-year period covered by the indictment was approximately $5,500,000.00 (App. 821a).

The alleged deficiency of $49,000.00 for the four years involved in Counts I-4 of the indictment, approximately $49,000.00, was alleged to have included unreported income and deductions to which petitioner was not entitled. These deductions were for contributions to religious and charitable organizations.

It was conceded by the government that petitioner and his corporations had contributed $20,000.00 to such organizations.

This was the amount of cash contributions and did not take into consideration the use of petitioner's trucks by the Red Cross, the Boy Scouts, the Y. M. C. A., nor gifts to high school and college fraternities in which petitioner's children were members. Gifts to individuals including the education of boys in schools or colleges were also excluded under the rulings and instructions of the court (App. 1181a, 1182a).

More than a score of witnesses, both men and women, including ministers, doctors, lawyers, civic workers and business leaders testified to the good reputation of petitioner (App. 891a, 892a, 893a).

Petitioner was not an educated man. He never went beyond the eighth grade in school. He did not keep any of his own books. He knew nothing about bookkeeping nor making out income tax returns but employed auditors on whose work he relied. He was a hard working man, a mechanic, devoting his time to the various enterprises with which he was connected, including cab companies and automobile repair shops (App. 892a, 893a, 891a).

Harold Wilkins and Leland Payton, Vice-Presidents of the Jolly Cab Company and the Jolly Motor Livery Corporation, respectively, were in charge of the actual operations of these companies. Payton employed the bookkeeper for both corporations, Mrs. Kathryn Jones, instructed her as to keeping the books and from time to time she consulted with Clarence A. Quinn, the auditor for these corporations.

Much of the testimony in the record related to checks received by the two corporations from insurance companies in payment for damages to cabs of the Jolly Cab Company and for advertisements placed on the cabs. These checks were turned over to petitioner by one of the Vice-Presidents named and deposited by him in his personal bank account. He endorsed each check so deposited, made out the deposit ticket in his own handwriting, and so identified the checks that the payor, the payee, and the purpose for which it was issued could be determined by any auditor or examiner. Petitioner's income tax returns were audited from time to time by Internal Revenue Agents, and he knew that it was their custom to examine the bank accounts of the taxpayer in such examinations (App. 978a, 983a, 1147a).

When these checks were delivered to petitioner, he instructed Vice-Presidents Payton and Wilkins to make the proper charges on the books of the corporations. On this point we quote from the testimony of petitioner as follows:

"Q. Well, when you took those checks and had them turned over to you, did Mr. Wilkins and Mr. Payton, or either of them, know anything about those checks?

A. Yes, sir. I instructed them to turn them over to me and see that proper bookkeeping was done.

* * * * * * * *

Q. And they had actual knowledge, then, as I understand you, from the beginning when these checks were turned over to you?

A. Yes, sir.

Q. And you say you instructed them to make the proper bookkeeping entries?

A. Yes, sir.

* * * * * * * *

Q. Had you claimed the proceeds of these checks as your individual property?

A. No, sir.

* * * * * * * *

Q. Did you expect these checks for insurance collections and advertisements to be charged to you on the books of the corporation?

A. Yes, sir.

Q. Were you solvent and able to pay any amount you received under those checks?

A. Yes, sir" (App. 898a-900a).

With respect to the bookkeeping, Mrs. Kathryn Jones, the bookkeeper, thus testified:

"Q. When were you employed as bookkeeper by the Jolly Cab Company?

A. In 1942.

Q. And for the Jolly's Motor Livery?

A. At the same time.

Q. And when did you become the part-time bookkeeper for the Jolly's Maintenance Service?

A. In '44 and '45.

Q. Who employed you as part-time bookkeeper for the Jolly's Maintenance Service?

A. Mr. Robert L. Payton.

Q. Who employed you as bookkeeper for the Jolly Cab Company?

A. Mr. Payton.

Q. What did Mr. Payton have to do, if anything, with your work as bookkeeper?

A. He gave me all my instructions. I was directly responsible to him. He gave me all my instructions. I was directly responsible to him. He gave me all entries to go on the books, pertaining to the business of the day.

• • • • • • • •

Q. What, if anything, did Mr. Jolly have to do with your work as bookkeeper for the Jolly Cab Company or Jolly's Motor Livery?

A. Not anything that I know of. He did not give me any instructions whatever.

Q. Did he ever furnish you any data or any material to put on the books?

A. No, sir.

Q. Did he ever ask you to keep anything from the records that you thought ought to be entered on the books?

A. No, sir.

Q. During the years that you have worked for him did Mr. Jolly ever ask you, or suggest, that you do anything that you thought was wrong?

A. No, sir.

Q. Did he ever ask you to conceal any records, or destroy any records, or anything of that kind?

A. No, sir" (App. 1024a-1025a).

The reasons why these checks were turned over to petitioner to handle personally is thus shown by the record:

"Q. Mr. Jolly, it has been testified here that certain checks payable to the Jolly Cab Company and the Jolly's Motor Livery Corporation, and perhaps some other business, were turned over to you and deposited in your personal back account?

A. Yes, sir.

Q. Is that testimony correct?

A. Yes, sir.

Q. Please state to the Court and jury the circumstances under which these checks were turned over to you, and why that was done.

A. Well, during the war, every once in a while a check would show up coming from insurance or advertising in the cab deposits in lieu of cash.

Q. I did not understand that.

A. I say, all during the war, and spasmodically, some of these checks would show up in the cab deposits in lieu of cash.

Q. Well, explain more fully what you mean by being substituted for cash, in your cash deposits.

A. Well, there was a tremendous amount of money coming in in the cab business in cash.

Q. Approximately how much?

A. About three thousand dollars a day.

Q. How much?

A. About three thousand dollars a day. And these checks would show up in the cab deposits without additional tickets being attached for them, as the cash seemed to have been taken out and these checks put in their place.

Q. For instance, if a check for five hundred dollars was in this, where a cash deposit should have been made, does that mean five hundred dollars cash had been taken out?

A. Yes, sir.

Q. And the check substituted?

A. Yes, sir.

Q. Was there any way that you could tell who did that?

A. No, sir.

* * * * * * * *

Q. Who made the contract for these advertisements?

A. I made it with the William Whaley Company of Louisville, years ago. They were long-time contracts.

Q. And did you make any contract direct with the advertisers?

A. No, sir.

* * * * * * * *

Q. When would you know or learn the amount that had been collected from these advertisements?

A. We wouldn't know until the check came in from Whaley Company" (App. 895a-898a).

Petitioner did not keep books on contributions but at the end of the taxable year prepared a memorandum for the auditor which represented his best recollection as to donations he had made (App. 913a).

Donations were made to the same agencies by the Jolly Cab Company, the Jolly Motor Livery Corporation, and by petitioner personally (App. 913a).

He testified that he did not intentionally overstate any of these contributions but stated that if there was any error he thought it was due to a mix-up as to the beneficiary of the gift and not an overstatement of the amounts contributed (App. 914a), and, further, that all contributions were not made in cash but the equivalent of cash, such as the purchase of canoes for Girl Scout and Boy Scout Camps and aid in the construction of a fraternity house at Southwestern, which he considered as a donation to that institution (App. 913a).

Petitioner was a generous contributor to many religious and charitable organizations. His generosity was not re-

stricted to people of his own race. He made donations to colored churches and rarely refused a request for aid (App. 1042a).

The purchase of fans and carpets for Sunday School rooms and Churches, and lumber for the repair of Churches were included in his contributions. Some of the lumber bills paid by him amounted to as much as $500.00 (App. 994a, 1042a, 1085a, 1086a).

In fact, one of the officials of the Highland Heights Presbyterian Church testified that this Church stands as a memorial to the generosity of petitioner (App. 1010a).

The Government's evidence to show the contributions were not made as claimed in the tax returns was restricted to testimony showing that various institutions had no record of such contributions. Some of these institutions did not keep a ledger record of donations, and the loose methods of accounting were not sufficient to establish an intentional overstatement of contributions by petitioner (App. 220a, 221a, 223a, 224a, 237a, 1120a, 1122a).

Petitioner was President of both the Jolly Cab Company and the Jolly Motor Livery Corporation. He did not draw a stated salary from either but his financial transactions with the corporations were handled by setting up accounts receivable on their books and charging these accounts with sums expended for his benefit or withdrawn by him. Frequently, these accounts were overdrawn in amounts in excess of the total of the so-called intercepted checks for any single year. **Petitioner paid these overdrafts when they were called to his attention by the auditor** (App. 904a, 1033a, 1068a, 1069a).

Quinn, the auditor, Payton and Wilkins, Vice-Presidents of the corporations, cooperated with the Internal Revenue Agents in working up the case against petitioner, and the latter officials refused even to discuss the case with the attorney for petitioner, so doing on the instructions of the

Revenue Agents. They testified, however, that petitioner never requested them to do anything they considered wrong or improper (App. 355a, 366a, 367a).

CHARGE OF THE COURT.

Beginning with page 1178a, the charge deals specifically with Government contentions as follows, to-wit:

1) Collections in settlement of damage claims from insurance companies.

2) From individuals.

3) Funds withheld from wages of employees.

4) Collections for advertising on posters and placards.

5) Collections for rents.

6) Rebates to the Jolly Cab Company and Jolly Motor Livery Corporation upon fleet purchases of automotive equipment.

7) Refunds to Jolly Cab Company and Jolly Motor Livery Corporation.

8) Dividends on group life insurance policy.

9) Collections for real estate.

10) Salvage of building material, parts, equipment, etc.

11) Payments for taxicab fares.

12) Transfers of stock.

13) Instructions in respect to claims for services and donations for the use of trucks or automobiles to charitable organizations.

14) The Court thus specifically instructed the jury with respect to the Government's theory as to funds on deposit in the trustee accounts of the Leader-Federal Savings and Loan Association:

> "If you find that the funds on deposit in the trustee accounts at Leader Federal Savings and Loan Association originated with the defendant or from sources within his dominion and control, and that he exercised control of all withdrawals from these accounts, and that he could make any disposition he desired of the funds withdrawn from these accounts, you may conclude that any dividends or interest credited to these accounts were income to the defendant which he was required to report on his individual income tax returns" (App. 1178a-1183a).

With respect to these trustee accounts, petitioner testified that he did not expect to derive any personal benefits from these accounts and that they were not used for his personal benefit, that he never gave something to his wife and then took it back (App. 906a, 907a). In this connection the Government witness Quinn and appellant's auditor, Minor, both testified that the dividends or interest from these trustee accounts were not personal income of appellant (App. 960a, 1140a).

The evidence in behalf of petitioner, consisting of 279 pages of the printed appendix, establishes affirmative defenses to the matters involved in these contentions of the Government, but the converse of the Government theories was nowhere submitted to the jury. The defense theories were supported by evidence which established:

a. That the proceeds of none of the checks involved were received by petitioner under a claim of right;

b. That he always recognized his obligation to pay or return to the corporations any sums that they were entitled to receive;

c. That he was solvent and able to pay any amount he received under these checks (App. 898a-900a);

d. That he paid corporations all accounts charged to him on their books (App. 905a), including large amounts

(App. 1068a, 1069a), so doing upon notice of such overdrafts by the auditor;

e. That after making gifts to his wife and son which were deposited in the Leader-Federal Building and Loan Association to him as trustee, petitioner did not exercise any control over these funds or use them for his benefit (App. 906a);

f. That the Government witnesses, Payton and Wilkins, officers of petitioner's corporations, had actual knowledge of the checks that were turned over to petitioner, and notwithstanding the fact that they had supervision over its books, did not disclose to petitioner in advance of the income tax investigation that these checks had not been charged to him on the books of the corporations in accordance with the instructions he had given them (App. 898a).

g. That the Government witnesses, Payton and Wilkins, did not deny that the foregoing instructions were given them by petitioner, nor testify at all in rebuttal.

h. That the Government witness, Quinn, the auditor for petitioner's corporations who was in a better position than petitioner to know what appeared on the books of the corporations, did not know (at least he so testified) that the checks involved had been omitted from the corporate books.

The matters above stated constituted affirmative defenses to the charges involved in the case, but they were ignored in the instructions given the jury. The charge was not materially different from what it would have been had petitioner not testified nor offered any proof whatever.

As stated by the Court in its instructions to the jury, the alleged fraud as contended for by the Government under the first four counts of the indictment against petitioner "consists principally of his failure to report substantial amounts of funds diverted by him from the Jolly Cab Company and another corporation, Jolly Motor Livery Corporation" (App. 1173a-1174a).

EXCEPTIONS TO CHARGE.

The following exceptions to the charge were taken by petitioner:

"Mr. Malone: Well, Your Honor, in regard to the instruction on willfulness, said it is largely a matter of intention.

We understand from the reading of the cases, particularly the Murdock case, I believe it is, that there is more considered, more than intention or knowing. Now, I feel that would have been a statement which would more clearly follow the law, and possibly would leave an inference with the jury that the two are really the same.

The Court: All right.

Mr. Malone: In connection with the—I may not have clearly understood you regarding the instruction later concerning the fact that a man is presumed to know the natural consequences of his acts. It was somewhat along that line.

As I understood it, coming after willfulness, it would appear that the jury would be confused then, and not know on which basis they should determine the guilt or innocence of the defendant.

We feel, concerning the reference to the 1950 return, that it was, as stated in Your Honor's charge, it did not set out the fact there that whatever happened in 1950 was as much to be—on the issue of intent, that whatever was done in 1950 was as consistent with innocence as with guilt.

Mr. Fitzhugh: It was restricted to intent.

Mr. Malone: We except to Your Honor's instruction concerning the statements of whether the various items of these checks for repairs, advertising, and similar items, were diverted and put in the personal bank account of the defendant, but Your Honor failed to

include or to point out that he had to have a claim of right to them, and an absence of an obligation to repay, both of those elements, before they could be considered income.

The Court: Well, you have made that the subject of one of your special requests.

Mr. Malone: One of our special requests, yes, sir.

The Court: That is right.

Mr. Malone: We except to Your Honor's instruction that the defendant, as a matter of law, was not entitled to deductions for the use of trucks on income tax returns. There was no specification as to whose income tax such matters could be deducted. There was also no instruction—that I understood there, that is, particularly at that time, that the defendant could have honestly believed that such were deductible.

Concerning the instruction on the reliance on a third party, or an accountant, or C. P. A., we except to that instruction, since the reliance on the accountant was stated—it has been stated—also that a man shall not be responsible there for the acts of the accountant on whom he has placed reliance, in the same manner as the general doctrine of respondeat superior.

I believe that is all the ones I had, Your Honor.

The Court: All right, Mr. Gwinn, you have others?

Mr. Gwinn: Yes, I have, if Your Honor please. We are excepting to the instruction on constructive dividends, primarily on the point covered in the special request as to what constitutes dividends, that has been refused by the Court.

But, secondly, and perhaps of equal importance, on the ground that the instructions with respect to constructive dividends are calculated to mislead the jury, unless the Court further instructs the jury that the defendant could not be found guilty for failure to include these constructive dividends in his tax report unless he knew or should have known that they con-

stituted income, and if he was under the impression that he had a right to have those charged to his account, and that they had been so charged on the books, then, irrespective of the question of whether they were income or not income, he should not be found guilty unless he had knowledge of the fact that they were income that should be reported in his tax return. There are so many of those items covered under the general instructions about constructive dividends, we feel that cautionary instruction should be given to the jury" (App. 1194a-1196a).

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

The charge of the trial court was so one-sided and unfair as to justify an exercise of the supervisory power of this Court to correct the resulting injustice to petitioner. In the case of Smith v. U. S. (Nos. 12,528, 12,529), decided by the Court of Appeals for the Sixth Circuit on March 5, 1956, the Court applied principles to the charge therein involved which were overlooked or disregarded in the instant case. In the Smith case, Judge Allen, who wrote the Opinion, said:

". . . It is error to issue instructions to the jury which assume as a fact material matters not established by the evidence. 1 Reid's Branson Instructions to Juries, 3rd ed., Section 23. The theory of the defendant must be stated clearly and completely. 53 Am. Jur., Section 540, page 432. A charge is erroneous if it ignores a defense claimed as to which there is evidence before the jury. 1 Reid's Branson Instructions to Juries, 3rd ed., Section 125; **State v. Price**, 83 W. Va. 71, 77; **Hyde v. United States**, 15 Fed. (2d) 816 (C. A. 4). This is a case rather closely

in point, for an instruction held erroneous in the Hyde case had excluded consideration of testimony which tended to show the defendant's good faith.

"The court's instruction to the jury at another point that it might consider Troy Smith's testimony as to his right under the law to apply the proceeds of an FHA loan to expenses already incurred, on the question of intent and as to whether the perpetration of a fraud was in his mind at that time, served only to confuse the jury because it was inconsistent with the specific charge above quoted. When the court gives inconsistent instructions on a material issue this violates the principle that the instructions must not mislead the jury and therefore must be consistent and harmonious. The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it. 1 Reid's Branson Instructions to Juries, 3rd ed., Section 104. Each of the instructions quoted is prejudicial and requires reversal of the judgment and sentence on Count 1."[2]

The Court of Appeals in its decision herein recognized that there was no "explicit recapitulation of each of the appellant's various theories of defense," but held that the omission did not constitute prejudicial error. However, the Court apparently failed to note that there was not only the absence of an "explicit recapitulation of theories" but failed to note that there was no reference to theories or defense supported by evidence.

(a) As stated by Judge Allen, "A charge is erroneous if it ignores a defense claimed as to which there is evidence before the jury."

The rule thus stated is so fair and fundamental and supported so generally by texts and judicial decisions, State

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[2] Judges Allen, McAllister and Miller rendered the decision in the Smith case. Judges McAllister, Miller and Stewart decided the instant case, but without an Opinion.

and Federal, that it seems passing strange that it should not have been recognized and applied in the instant case.[3] Its application does not depend upon the strength of the evidence introduced in support of the theory nor the weight of opposing evidence.

In **Morse v. Ward**, supra, the Supreme Court of Vermont said:

> "That it is the duty of the court to conduct a trial with the utmost impartiality and fairness is elementary and fundamental. 14 R. C. L. 773; Vt. Const., c. 2, Sec. 28. This obligation extends throughout the trial—to the matter of charging the jury as much as to the other incidents of the proceedings. Argumentativeness is to be avoided, and the claims and theories of the parties are to be stated with equal clearness and

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[3] *Bird v. U. S.*, 180 U. S. 356, 357;
Hickory v. U. S., 160 U. S. 408;
Stevenson v. U. S., 162 U. S. 313, 318;
Allison v. U. S., 160 U. S. 203;
Wright v. U. S. (8th Cir.), 175 F. 2d 384, 388;
Kinard v. U. S. (Ct. App. D. C.), 96 F. 2d 522;
Little v. U. S., 73 F. 2d 861;
Minner v. U. S. (10th Cir.), 57 F. 2d 506;
U. S. v. Messinger (4th Cir.), 68 F. 2d 234;
Meadows v. U. S. (Ct. App. D. C.), 82 F. 2d 881;
Commonwealth v. Jordan, 328 Pa. 439, 196 A. 2d 10, 13;
Hendry v. U. S. (6th Cir.), 233 Fed. 5, 18;
People v. Vezerian (Calif.), 193 P. 2d 944;
U. S. v. Noble (3rd Cir.), 155 F. 2d 315;
State v. Fraley (Mo.), 116 S. W. 2d 17;
Perez v. State (Tex.), 172 S. W. 2d 314;
Bailey v. State (Ark.), 173 S. W. 2d 1010;
People v. Carmen (Calif.), 228 P. 2d 281;
Davis v. Comm. (Ky.), 252 S. W. 2d 9;
Kelly v. Comm. (Ky.), 267 S. W. 2d 536;
Myers v. State (Tenn.), 206 S. W. 2d 30;
Witt v. Comm., 305 Ky. 31, 202 S. W. 2d 612;
Matterson v. State (Tex.), 152 S. W. 2d 352;
Duff v. Comm., 297 Ky. 502, 180 S. W. 2d 412;
Morse v. Ward (Vt.), 150 Atl. 132;
State v. Comstock (W. Va.), 70 S. E. 2d 648;
Lewis v. People (Col.), 60 P. 2d 1089;
Boatwright v. U. S. (8th Cir.), 105 F. 2d 737, 739.

completeness. It is no part of the court's duty to accentuate or give undue prominence to any fact, claim, or circumstance, and to do so may result in prejudicial error. The charge should be full, fair, and correct on all issues, theories, and claims within the pleadings, so far as the evidence requires."

In **Matterson v. State**, supra, the Court said:

"From the case of Brickell v. State, 138 Tex. Cr. R. 101, 134 S. W. 2d 262, 263, we take the following quotation: 'It is a well settled rule in this state that a defendant is entitled to an affrmative instruction upon every issue raised by the evidence, whether such evidence was produced by the state or the defense, and whether it be strong or feeble, unimpeached or contradicted. See Kibbe v. State, 133 Tex. Cr. R. 494, 112 S. W. 2d 783, and authorities there cited.' "

In **Duff v. Comm.**, supra, the Court said:

"An accused person is entitled to instructions applicable to every state of case, reasonably deducible from the evidence."

In **State v. Comstock**, supra, the Court said:

"In a criminal prosecution it is reversible for a trial court to give an instruction which assumes facts not established by the evidence." (Paragraph 2 of the syllabus by the court.)

In **Kinard v. United States** (C. A. District of Columbia), 96 F. 2d 522, 525, the court said:

"The applicable rule has been stated by the Supreme Court in Stevenson v. United States, 162 U. S. 313, 323, 16 S. Ct. 839, 843, 40 L. Ed. 980 as follows:

" 'A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such

passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet if there be **any evidence fairly tending to bear upon** the issue of manslaughter, it is the province of the jury to determine from all evidence what the condition of mind was, and to say whether the crime was murder or manslaughter.' (Emphasis supplied.)

"In the same case, 162 U. S. 313, at page 314, 16 S. Ct. 839, 40 L. Ed. 980, the court stated the rule again, in the following language:

" 'The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question. So long as there is **some evidence** upon the subject, the proper weight to be given it is for the jury to determine. If there were **any evidence** which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true and whether it showed that the crime was manslaughter instead of murder.' " (Emphasis supplied.)

* * * * * * *

"The fact that in the present case there was other evidence highly persuasive of guilt of murder does not affect the applicability of the rule stated. As the court said in Stevenson v. United States, supra, 162 U. S. 313, at page 315, 16 S. Ct. 839, 40 L. Ed. 980: 'The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.' "

(b) The court, in its summation of the evidence, emphasizes at length the contentions of the Government, but ignores the exculpatory evidence on the same points offered by the accused. This was plain error. **Quercia v. U. S.**, 289 U. S. 466; **Williams v. U. S.** (9th Cir.), 93 F. 2d 685; **Boatwright v. U. S.** (supra); **Sullivan v. U. S.** (Ct. of App. D. C.), 178 F. 2d 723, 725; **Bellecia v. U. S.** (Ct. of App. D. C.), 184 F. 2d 402; **Prezzi v. U. S.** (D. C.), 62 A. 2d 196, 200; **People v. Mason** (Calif.), 105 P. 2d 481, 483; **Bollenbach v. U. S.**, 326 U. S. 607.

> "The influence of the trial judge on the jury is necessarily and properly of great weight," Starr v. United States, 153 U. S. 614, 626, 14 S. Ct. 919, 923, 38 L. ed. 841, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge." Bollenbach v. U. S., supra.

Language used by the Court of Appeals in Boatwright v. U. S., supra, and Minner v. U. S., supra, applies to the instructions in the instant case. In the Boatwright case it is stated:

> "The charge impresses us as being argumentative throughout. In fact, we can conceive of no more effective argument for the Government than that which characterizes the charge in this case. The judge narrated material and important facts testified to by Government witnesses and wove them into an argument that was clearly prejudicial. This, we think, requires a reversal in this case."

In Minner v. U. S., the judge said:

> "The trial judge undertook to sum up and comment on the evidence. He narrated the important facts

testified to by witnesses for the government but he wholly failed to sum up the evidence in behalf of Minner. His comments were in the nature of an argument to the jury rather than a fair and dispassionate statement of what the evidence showed and a tempered expression of his opinion as to the facts. In doing so, he assumed the role of an advocate rather than an impartial judge. That this was error is established by repeated decisions."

(c) The charge was not only inconsistent and misleading, but assumed as facts material matters not in evidence. It was misleading with respect to the matters referred to in the exceptions to the charge and particularly as to its definition of the word "willfull," which was correctly defined as an abstract term but misapplied when considered in the light of that portion of the charge with respect to presumptions.

Morisette v. U. S., 342 U. S. 246;
Haigler v. U. S. (10th Cir.), 172 F. 2d 986;
Wardlow v. U. S. (5th Cir.), 203 F. 2d 884.

In Wardlow v. U. S. the court said:

"It is not settled that **'willfully,'** as used in this offense (income tax fraud), **means more than intentionally or voluntarily**, and includes an evil motive or bad purpose * * *"

In **Bloch v. U. S.** (9th Cir.), 221 F. 2d 786, the court held the following instruction to be erroneous:

"**The presumption is that a person intends the natural consequences of his acts, and the natural inference** would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

In Morisette v. U. S., supra, this court said that "**presumptive** intent" has no place in a case of this character, and further that "incriminating presumptions are not to be improvised by the judiciary."

See also: **Hibbard v. U. S.** (7th Cir.), 172 Fed. 66, which deals at some length with presumptions as they affect the question of intent.

Petitioner did not personally operate taxicabs nor collect taxicab fares, but the court apparently assuming without evidence that he did, charged the jury that payments for taxicab fares if diverted by petitioner to his own use would constitute constructive dividends, which he was required to report on his individual tax returns (App. 1188a).

II.

The trial judge in his instructions invaded the province of the jury. A confusion of the relative functions of the court and the jury permeates the entire charge and explains some of its flagrant errors.

Whether the funds withdrawn from the corporations were loans, advances, overdrafts, or dividends was a question of fact for the jury and not a question of law for the court.

Avery v. Commissioner, 292 U. S. 210, 214;
Cohen v. Commissioner of Internal Revenue (5 Cir.), 121 F. 2d 348;
Wiese v. Commissioner of Internal Revenue (8 Cir.), 93 F. 2d 921;
Mertens et al. v. Rogan (Dist. Ct. S. D. Calif.), 56 Fed. Supp. 450;
Hyland v. Commissioner of Internal Revenue (2 Cir.), 175 F. 2d 422.

Petitioner testified positively (App. 899) that he never claimed these funds as his own but always recognized his

obligation to pay the corporations any sums he withdrew from them. Irrespective of whether these funds constituted constructive dividends or loans, petitioner's testimony raised an issue of fact that should have been submitted to the jury under appropriate instructions (Wiese v. Commissioner of Internal Revenue, supra).

The court in telling the jury over and over again that these funds constituted constructive dividends that should have been reported by petitioner in his income tax returns clearly invaded the province of the jury and the charge of the court was equivalent to a peremptory instruction to return a verdict of guilty. The error of omission on the specific point under consideration was not cured by a correct abstract instruction on the question of intent or the doctrine of reasonable doubt. In Bollenbach v. U. S., supra, the court said:

> "If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

III.

The Court of Appeals in affirming the judgment in this case has decided an important Federal question in a way in conflict with applicable decisions of this Court. The judgment runs foul of the claim of right doctrine deeply rooted in our Federal tax system.

North American Oil Consolidated v. David Burnet, 286 U. S. 417, 424;

Commissioner v. Wilcox, 327 U. S. 404;

U. S. v. Lewis, 340 U. S. 590;

Healy v. Commissioner of Internal Revenue, 345 U. S. 278.

This doctrine was unimpaired by **Rutkin v. U. S.**, 343 U. S. 130.[4] However, the decision in the Rutkin case has

[4] *Midvale Company v. U. S.*, 124 Fed. Supp. 683.

created some confusion as to the application of this doctrine.

Marienfield v. U. S. (8 Cir.), 214 F. 2d 632, 636.

The public interest would be served by a clarification of the ruling with respect to this doctrine. Any repudiation or modification thereof should be made by this Court. Some of the District Courts are still of the opinion that gain does not constitute income in the absence of a claim of right and an enforceable obligation to repay.

In re Ward, 131 Fed. Supp. 387;

Memphis Memorial Park v. McCann, 133 Fed. Supp. 293.

Petitioner's Special Request No. 2 was based squarely on the Wilcox case and petitioner's evidence clearly brought him within the rule as pronounced in that case. Its repudiation in this case by inadvertence or disregard would be equivalent to an ex post facto rule that would make criminal practices theretofore followed by taxpayers under the advice of accountants and recognized as legal by former decisions of the courts.

IV.

The court erred in refusing petitioner's Special Requests and particularly in refusing Special Requests No. 2 and No. 3. Referring specifically to petitioner's Special Request No. 3, it is respectfully insisted that this request related to undisputed evidence concerning the matter referred to in the request and forming an important part of the theory of petitioner.

In **Bird v. U. S.,** 180 U. S. 356, 357, the court said:

> "It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal. The numerous decisions to this effect are cited

in Wharton on Criminal Law, Vol. 3, Sec. 3162, 7th ed. The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved."

Bird v. U. S. is a leading case and the rule therein laid down is too well established by both State and Federal decisions to require elaboration or discussion of additional authorities.[5]

Defendant's Special Request No. 2, duly tendered and refused by the court, reads as follows:

"At the request of the defendant, the Court instructs the jury that taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain, and (2) the absence of a definite unconditional obligation to repay or return that which would otherwise constitute a gain. The absence of an enforceable obligation to pay the money to someone else is only one of the two conditions necessary to constitute income. There must also exist a claim of right on the part of the taxpayer and unless you find and are satisfied from the proof beyond a reasonable doubt that the defendant received the proceeds of insurance collections arising out of claims for damages under a claim that he was entitled to such proceeds and also that there was no obligation on his part to repay to the corporations the sum so received, then these collections did not constitute income that should have been reported in his individual tax returns. What is said with respect to the insurance collections also applies to the collections for advertisements and other items

[5] *State v. Sutton*, 230 N. C. 244, 52 S. E. 2d 921;
U. S. v. Moble (3 Cir.), 155 F. 2d 315, 317;
Thomas v. U. S. (6 Cir.), 151 F. 2d 183;
State v. Friddle, 223 N. C. 751, 25 S. E. 2d 751, 753.

received by defendant and deposited in his personal account" (App. 1199a).

Defendant's Special Request No. 3 is as follows:

> "At the request of the defendant, the Court instructs the jury that if the defendant was entitled to withdraw funds from the corporation to be charged to his account and be repaid by him and he instructed Wilkins and Payton, Vice-Presidents, respectively, of the Jolly Cab Company and the Jolly Motor Livery Corporation, to turn over to him checks for insurance collections and for advertisements and make the proper bookkeeping entries, then you would not be justified in convicting him on account of the fact that he received such checks and deposited same to his personal bank account, and in the absence of any facts and circumstances showing the contrary, he would be justified in assuming that Wilkins and Payton complied with these instructions" (App. 1200a).

There is set out in the Appendix to this Petition four Special Requests duly tendered and refused by the court, together with the objections to the refusal to grant these requests.

V.

The defendant was denied a fair and impartial trial.

In view of the length of this petition, we will not discuss this point further than to refer to petitioner's Motion for a Mistrial containing seventeen grounds (App. 882a-886a).

CONCLUSION.

In conclusion, we call the attention of the Court to the extremely severe sentence imposed by the trial judge. It may be that a reviewing court has no power over the sentence, yet a harsh sentence may justify the court in reversing a case that would otherwise be affirmed. At any rate,

such a sentence may turn the balance in favor of reversal and prevent the court from condoning errors on account of the weight of the evidence.

U. S. v. Hoffman, 137 F. 2d 416, 422;
U. S. v. Trypuc, 136 F. 2d 900, 902;
Amendola v. U. S., 17 F. 2d 529, 530.

The charge as a whole was confusing and misleading. An example of such confusion appears at pages 1190a-1191a of the Appendix. Considered as a whole, the charge was an argument for conviction rather than an instruction to the jury.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the Court of Appeals for the Sixth Judicial Circuit, commanding that court to certify and send to this court for its review and determination on the day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled on its docket, D. L. Jolly, Sr., Appellant, v. United States of America, Appellee, No. 12,412, to the end that said case may be reviewed and determined by this court as provided by 28 U. S. C., Sec. 1254, and the applicable rules promulgated by this court governing applications for certiorari in criminal cases, and that the judgment of the Court of Appeals be reversed by this honorable court, and that petitioner may have such other and further relief in the premises as to this honorable court may seem right and proper.

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APPENDIX.

Objections to refusals to give certain special requests and these requests are set out as follows:

Mr. Gwinn: Defendant excepts to the refusal to give Special Request Number 2, because it was not covered by the general charge of the Court, presents a rule of law established by the Supreme Court and the Court of Appeals for this Circuit that is in conflict with the constructive dividends recognized, applied, and given by the Court in his general charge. The rule in the Lashelle case and Wilcox case is applicable, and the charge on constructive dividends is in conflict with that rule.

(Said special request is as follows:)

3293 "Defendant's Special Request No. 2.

Refused, Boyd, J.

"At the request of the defendant, the Court instructs the jury that taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain, and (2) the absence of a definite unconditional obligation to repay or return that which would otherwise constitute a gain. The absence of an enforceable obligation to pay the money to someone else is only one of the two conditions necessary to constitute income. There must also exist a claim of right on the part of the taxpayer and unless you find and are satisfied from the proof beyond a reasonable doubt that the defendant received the proceeds of insurance collections arising out of claims for damages under a claim that he was entitled to such proceeds and also that there was no obligation on his part to repay to the corporations the sum so received, then these collections did not constitute income that should have been reported in his in-

dividual tax returns. What is said in respect to
3294 the insurance collections also applies to the collections for advertisements and other items received by defendant and deposited in his personal account."

Mr. Gwinn: The defendant excepts to the refusal of the Court to give Special Request Number 3, because it was strictly applicable to the facts, was material on the issue of intent, not covered in the general charge, and particularly points out something not indicated in the general instructions, that defendant, in the absence of facts and circumstances showing to the contrary, was justified in assuming that Wilkins and Payton complied with his instructions, and these instructions were material on the issue of intent, that is, the instructions given Wilkins and Payton.

(Said special request is as follows:)

3295 "Defendant's Special Request No. 3.

Refused, Boyd, J.

"At the request of the defendant the Court instructs the jury that if the defendant was entitled to withdraw funds from the corporation to be charged to his account and be repaid by him and he instructed Wilkins and Payton, Vice-Presidents, respectively, of the Jolly Cab Company and the Jolly Motor Livery Corporation, to turn over to him checks for insurance collections and for advertisements and make the proper bookkeeping entries, then you would not be justified in convicting him on account of the fact that he received such checks and deposited same to his personal bank account, and in the absence of any facts and circumstances showing the contrary, he would be justified in assuming that Wilkins and Payton complied with these instructions."

3296 Mr. Gwinn: Defendant excepts to the refusal of the Court to give Special Request Number 4, because it states a correct rule of law, known as the Cohan rule, supported by the cases cited in the footnotes to the instruction, and was not fully covered in the general instructions, though partially so.

(Said special request is as follows:)

"Defendant's Special Request No. 4.

Refused—Boyd, J.

"At the request of the defendant, the Court instructs the jury that it is the theory of the Government in this case that the defendant deliberately stated contributions that were not made and did so for the purpose of evading and defeating his income tax. If the proof shows that he intentionally padded the claimed deductions for contributions and that this was done willfully and with intent to defeat the payment of his income tax, he would be guilty, but the mere fact that he may have overstated the amount of such contributions would not of itself justify you
3297 in returning a verdict of guilty. In this connection, the Court instructs the jury that absolute certainty in claiming deductions for contributions is not required and if the defendant did not keep books and records from which the amount of such contributions could be determined with precision, then he would be justified in estimating the same, and if this estimate was honestly made you would not be justified in returning a verdict of guilty although the defendant was unable to support by proof the deductions claimed."

Mr. Gwinn: Defendant excepts to the refusal of the Court to give Special Request Number 5, because it was strictly applicable to the question of intent, and

not covered in the general instructions of the Court, and related, not to an isolated bit of evidence, but to an entire line of evidence.

(Said special request is as follows:)

3298 "Defendant's Special Request No. 5.

Refused—Boyd, J.

"At the request of the defendant, the Court further instructs the jury as follows:

"Records which the defendant kept, or which were kept under his instructions, may be considered by you in determining whether there was a willful failure to report collections from insurance companies arising out of claims for damages filed against such companies. In this connection, the Court instructs the jury that, if checks representing such collections were deposited by the defendant in his bank account and sufficiently identified to enable an auditor, accountant, or Federal investigator to trace the source of these checks, and you further find that the defendant knew or had reason to believe that the deposit tickets would be examined by Government auditors in any investigation of his income tax returns, then you may consider the entries on such deposit tickets, made in the handwriting of the defendant, in determining
3299 whether the failure to report these collections was the result of an intentional fraud or was the result of error or mistake in the income tax returns."

No. 773

No. 12,412.

FILED

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

D. L. JOLLY, SR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING.

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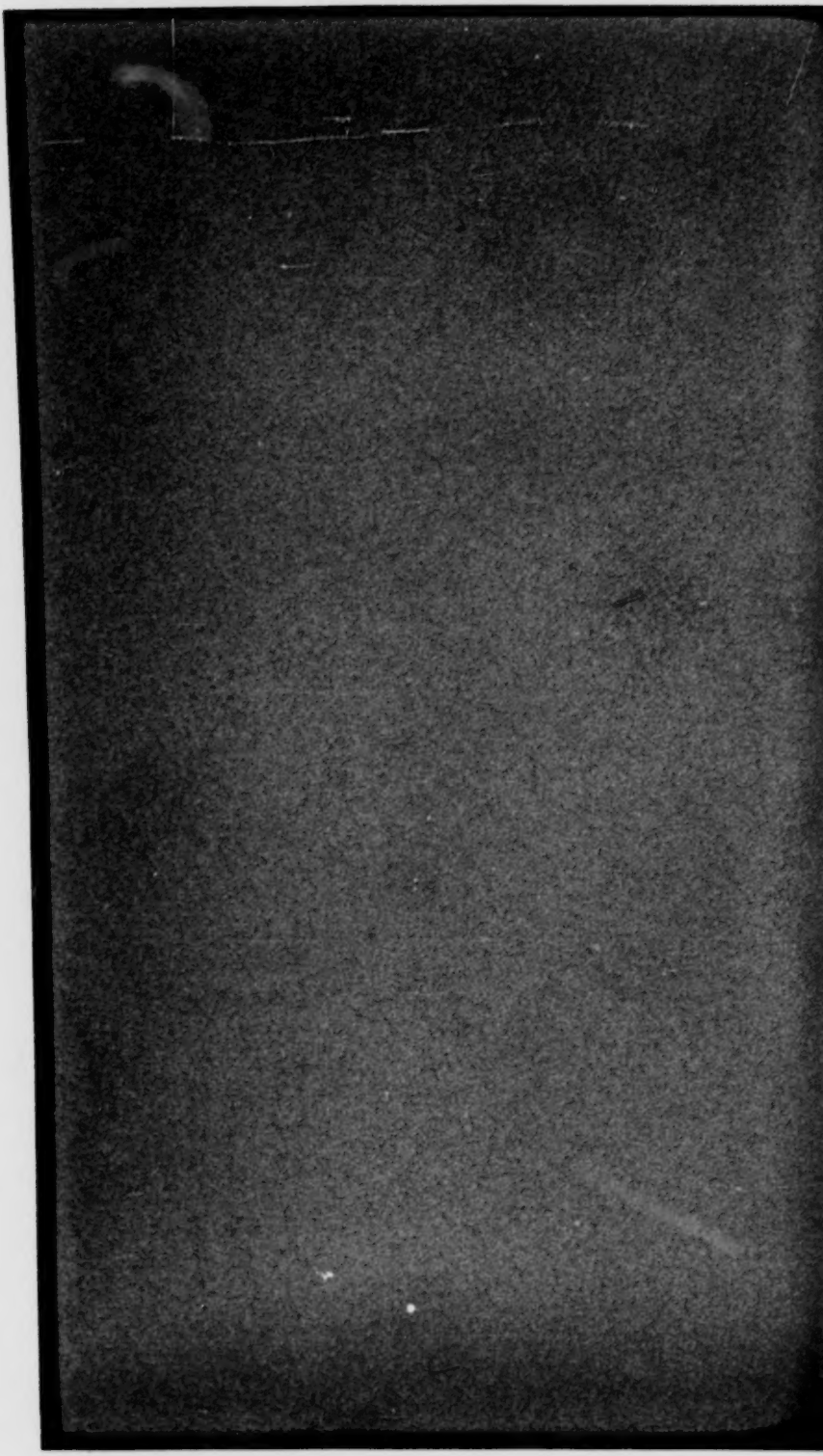

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

D. L. JOLLY, SR.,
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vs.

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PETITION FOR REHEARING.

May It Please the Court:

Entertaining as they do a strong conviction that the court inadvertently overlooked or disregarded points of controlling importance in the judgment rendered, counsel for appellant feel under an imperative obligation to their client and also an obligation to the court to call its attention to these matters and urge their reconsideration.

The order of this court, affirming the conviction, reads as follows:

> "Before McAllister, Miller and Steward, Circuit Judges.
>
> "A jury found the appellant guilty upon four counts of an indictment charging attempts to evade federal income taxes in violation of 26 U. S. C., Sec. 145 (b) (1952 Ed.). Of theretofore unblemished reputation,

and a leader in his community, the appellant, upon conviction, was ordered to pay a $40,000 fine and sentenced to a term of ten years in prison.

"Sixteen grounds for reversal are asserted by able counsel on this appeal. We find merit in none of them. There was abundant evidence to support the jury's verdict. No prejudicial error was committed in the admission of evidence, nor in the court's refusal to give certain instructions requested by the appellant. **While it would have been preferable for the trial judge to have included in his instructions an explicit recapitulation of each of the appellant's various theories of defense, his omission to do so did not, in our opinion, constitute prejudicial error in this case.** The instructions as given were otherwise complete and free from error. Nor did the court err in overruling the motion for a mistrial and the subsequent motion for a new trial.

"The sentence imposed by the trial judge was, in our opinion, extremely severe. Since it was within his statutory authority, however, we are without power to review it.

"The judgment of the district court is affirmed." (Emphasis ours.)

We have printed in bold type a portion of the above order for the purpose of emphasizing our contention that the trial judge not only failed to recapitulate explicitly appellant's various theories of defense, but that the trial judge omitted entirely any reference to the major theories of defense, so doing notwithstanding the fact that these theories were supported by material and in some instances undisputed evidence.

Before a recital of theories of the defense and a citation of authorities supporting these theories, we shall briefly analyze the charge of the trial court.

I.

The first four pages of the charge (App. 1169a-1173a) are abstract instructions as they relate to the instant case, not dealing specifically with the theory of either the Government or the defendant. The next three pages with the exception of two paragraphs on page 1176a deal mainly with abstractions as applicable to any income tax fraud case as to the instant case.

The two paragraphs on page 1176a deal with matters occurring in 1950 and 1951, subsequent to the indictment years.

The next page, 1177a, is an abstract instruction on circumstantial evidence and the definition of gross income.

Beginning with page 1178a, the charge deals specifically with Government contentions as follows, to-wit:

1) Collections in settlement of damage claims from insurance companies.

2) From individuals.

3) Funds withheld from wages of employees.

4) Collections for advertising on posters and placards.

5) Collections for rents.

6) Rebates to the Jolly Cab Company and Jolly Motor Livery Corporation upon fleet purchases of automotive equipment.

7) Refunds to Jolly Cab Company and Jolly Motor Livery Corporation.

8) Dividends on group life insurance policy.

9) Collections for real estate.

10) Salvage of building material, parts, equipment, etc.

11) Payments for taxicab fares.

12) Transfers of stock.

13) Instructions in respect to claims for services and donations for the use of trucks or automobiles to charitable organizations.

14) The Court thus specifically instructed the jury with respect to the Government's theory as to funds on deposit in the trustee accounts of the Leader-Federal Savings and Loan association:

> "If you find that the funds on deposit in the trustee accounts at Leader Federal Savings and Loan Association originated with the defendant or from sources within his dominion and control, and that he exercised control of all withdrawals from these accounts, and that he could withdraw the funds at his option, and that he could make any disposition he desired of funds withdrawn from these accounts, you may conclude that any dividends or interest credited to these accounts were income to the defendant which he was required to report on his individual income tax returns" (App. 1180a, 1181a).

With respect to these trustee accounts, appellant testified that he did not expect to derive any personal benefits from these accounts and that they were not used for his personal benefit, that he never gave something to his wife and then took it back (App. 906a, 907a). In this connection the Government witness Quinn and appellant's auditor, Minor, both testified that the dividends or interest from these trustee accounts were not personal income of appellant (App. 906a, 1140a).

Without continuing a breakdown of the instructions or singling out isolated portions of the charge for comment, we think the foregoing paragraphs establish to a mathe-

matical certainty that the charge was explicit with respect to the theories of the Government. Other explicit instructions concerning the Government's theories and contentions could be cited but it is believed that the foregoing are adequate to sustain the proposition stated.

The charge, however, will be searched in vain for any instruction concerning the theories of the appellant on the above matters, although these theories were supported by evidence and directed to the attention of the trial judge by request for special instructions. These requests are set out in the appendix to this petition.

The proof of appellant was not restricted to a mere denial of the Government's contentions. On the contrary, the appellant introduced evidence relating to each and all of the specific matters involved in the Government's theories (1-14, inclusive).

Included in such evidence was the unequivocal testimony of appellant that when he received the so-called diverted or intercepted checks, he instructed Wilkins and Payton, Vice-Presidents of the Jolly Cab Company and the Jolly Motor Livery Corporation, respectively, and in charge of their operations, to turn the same over to him and see that proper bookkeeping was done; that he expected these checks to be charged to him on the books of the corporations; that he was solvent and able to pay any amount he received under these checks (App. 898a-900a); that at no time did he claim the proceeds of these checks belonged to him personally, but expected them to be charged to his account and was ready to pay the account as he did other accounts charged to him on the books of the corporations (App. 905a). Appellant further testified, and as we recall, without dispute that on occasions when his account was overdrawn, Mr. Quinn advised him to pay the overdraft and he did that very thing (App. 905a). It also appeared

without dispute in the record that appellant did not draw any salaries from the corporations but certain amounts were set up each month and credited to accounts receivable. Appellant's personal expenses were paid from these accounts and charged to him and thereafter paid to the corporations according to these accounts as recorded on its books which were not kept by appellant (App. 904a).

The checks under consideration were indorsed by appellant in his own handwriting, deposited by him in his personal bank account. Each check was sufficiently identified on the deposit slip prepared by him to enable any auditor to trace it and determine from whom it was received and the purpose for which it was issued. Mrs. Jones, the bookkeeper, testified that large amounts, these in some instances exceeding the amount of the so-called intercepted checks during any single year, were obtained from the corporations by appellant, charged to him on its books and paid by him (App. 1068a, 1069a). These so-called intercepted checks were not paid because they were not called to her attention by Payton and Wilkins, primarily charged with the responsibility of supervising her bookkeeping (App. 1035a), nor by the auditor, Quinn, who testified as a swift and willing witness for the Government and who, if he did not know that these checks had not been charged on the books, was blind in one eye and could not see good out of the other. But the three last mentioned were Government witnesses and for some reason were cloaked with immunity while the fire of the Government was directed solely against appellant.

The matters above stated constituted affirmative defenses to the charges involved in this case but they were not mentioned specifically in the instructions to the jury. The charge was not materially different from what it would have been had appellant not testified nor offered any proof whatever. The situation presented to the Court was not

one where the defense was a mere denial of the charges. In view of the Court's elaborate summation of the testimony of the Government and the telling emphasis placed thereon and the entire absence of even a specific reference to appellant's theory, the charge was equivalent to a direction from the trial judge to the jury to return a verdict of guilty. **In the light of this charge, the jurors, consistent with their oaths to follow the law as stated by the Court, could not have returned a verdict of not guilty even though they believed that Jolly recognized his obligation to repay the corporations the amount of checks withdrawn, gave the instructions to which he testified to Payton and Wilkins and did not know that these instructions had been violated and no record made on the books of the corporations of the checks for insurance and advertising.** The fact that the trial judge may have disbelieved this testimony was no justification for a refusal to charge the theory of the defendant based upon testimony.

PRINCIPLES GOVERNING INSTRUCTIONS TO JURIES.

It is respectfully insisted that the charge violated principles hereinafter stated and it is not believed that this Court intended to repudiate or modify these principles.

1. The defendant in a criminal case is entitled, as of right, to have clearly stated to the jury each distinct and important theory of defense, supported by evidence, so that the jury may understand that theory and the essential rules applicable to it.

Stevenson v. U. S., 162 U. S. 313, 318;
Bird v. U. S., 180 U. S. 356, 357;
Schmeller v. U. S., 6th Cir., 143 F. 2d 544, 551;
Wright v. U. S., 8th Cir., 175 F. 2d 384, 388;
Kinard v. U. S., Ct. App. D. C., 96 F. 2d 532;

Little v. U. S., 73 F. 2d 861;
U. S. v. Messinger, 4th Cir., 68 F. 2d 234;
Meadows v. U. S., D. C. Ct. App., 82 F. 2d 881;
Commonwealth v. Jordan, 328 Pa. 439, 196 A. 10, 13;
Hendry v. U. S., 6th Cir., 233 Fed. 5, 18.

Even in a civil case it is error for the Court to submit the evidence and theory of one party prominently and fully to the jury and not call their attention to the main points of the opposite party's case.

Weiss v. Bethlehem Iron Co., 3rd Cir., 88 F. 23;
Pullman v. Hall, 46 F. 2d 399;
U. S. v. Smith, 9th Cir., 55 F. 2d 141;
U. S. v. Messinger, supra;
Chicago v. Voelker, 8th Cir., 129 F. 522.

2. A Federal trial judge need not summarize the evidence at all. But if he undertakes to do so, the summary must be fair and adequate. **The authorities are agreed that it must not be one-sided.**

Quercia v. U. S., 289 U. S. 466;
Williams v. U. S., 9th Cir., 93 F. 2d 685.

In **Meadows v. State**, D. C., Ct. App., 82 F. 2d 881, the Court held as stated in paragraph 1 of the syllabus:

> "Where defendant's evidence supported theory that killing was done in self-defense and government's evidence supported theory that it was not, both parties were entitled to instructions covering their respective theories."

In **Little v. U. S.**, 10th Cir., 73 F. 2d 861, 867, the Court said:

> "A charge that if the jury fails to find the essentials of the crime charged, there should be an acquittal—the converse of the charge given—puts to the jury the defendant's side of the case and, when requested, should be given."

In **People v. Mitchell**, S. Ct. of Cal., 93 Pac. 2d 121, 127, Judge Houser, in his dissenting Opinion, admirably states the rules governing instructions to juries as deduced from the overwhelming weight of judicial authority. We quote therefrom as follows, to-wit:

"Again referring to the transcript of the proceedings had in the trial court regarding the fact that the trial court employed 2000 words or more in defining the crime of murder, and in telling the jury in detail about the various ramifications of the law regarding the same—does it seem reasonable to presume that had even a small percentage of those 2000 words been dedicated to the purpose of informing the jury relative to its right under the circumstances to convict the defendant of the crime of manslaughter, the result would have been identical with that which was reached in the absence of such information? Otherwise stated—in the light of the evidence herein adduced—may it confidently be declared as the law of this state that because the jury, in effect, recommended the 'death' penalty, and thereby precluded the imposition of any lesser punishment, the giving of instructions regarding lesser offenses than that of first degree murder would be rendered unnecessary as far as the rights of defendant were concerned? If that question may not be answered affirmatively with respect to the crime of second degree murder, no sufficient reason is readily discernible for failing to give instructions regarding the crime of manslaughter, where evidence supporting such offense is adduced. In my opinion, the law concerning the question herein being considered is ably and aptly expressed in the very recent decision entitled Kinard v. United States, 68 App. D. C. 250, 96 F. 2d 522, 524, wherein the court said:

" 'In a criminal case a court should instruct on all essential questions of law involved in the case, whether

requested or not. People v. Odell, 230 N. Y. 481, 130 N. E. 619; Commonwealth v. Ferko, 269 Pa. 39, 112 A. 38; Pearson v. State, 143 Tenn. 385, 226 S. W. 538; Duroff v. Commonwealth, 192 Ky. 31, 232 S. W. 47; State v. Lackey, 230 Mo. 707, 132 S. W. 602, * * *. It is further assigned as error that the trial court, in its charge, instructed the jury concerning manslaughter as follows: 'This indictment which charges the defendant with murder in the first degree carries the charge of what we call the included offenses. The included offenses of murder in the first degree are murder in the second degree and manslaughter. But you are told that in the judgment of the Court the facts as revealed in the evidence in this case are not of such a nature and character as to sustain a verdict of manslaughter, and therefore you are instructed that your verdict, which will come at the end of the case, will be either guilty of murder in the first degree, or guilty of murder in the second degree, or not guilty.' * * * It is true that defendant's testimony was sharply contradicted. It is arguable that the evidence was overwhelmingly indicative of murder rather than manslaughter. But that is beside the point so far as concerns the propriety of the instruction given. It was not the duty of the trial court to weigh the evidence and determine whether the defendant was guilty of murder or manslaughter, but merely to determine the preliminary question of law—whether there was such a complete absence of evidence upon the issue of manslaughter as to require that it be taken from the consideration of the jury. The applicable rule has been stated by the Supreme Court in Stevenson v. United States, 162 U. S. 313, 323, 16 S. Ct. 839, 843, 40 L. Ed. 980, as follows: 'A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the

crime from murder to manslaughter by reason of any absence of malice; and yet if there be **any evidence fairly tending to bear upon** the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter.' (Emphasis supplied.) In the same case, 162 U. S. 313, at page 314, 16 S. Ct. 839, 40 L. Ed. 980, the court stated the rule again, in the following language: 'The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question. So long as there is **some evidence** upon the subject, the proper weight to be given it is for the jury to determine. If there were **any evidence** which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true and whether it showed that the crime was manslaughter instead of murder.' (Emphasis supplied.) The only situation, then, in which an instruction taking the issue of manslaughter from the jury is proper, is one in which, as ruled in the Stevenson Case, there is no 'evidence relevant to the issue of manslaughter' or no 'evidence fairly tending to bear upon the issue of manslaughter.' * * * The fact that in the present case there was other evidence highly persuasive of guilt of murder does not affect the applicability of the rule stated. As the court said in Stevenson v. United States, supra, 162 U. S. 313, at page 315, 16 S. Ct. 839, 40 L. Ed. 980: 'The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.' (See footnote where it was

said: 'This rule has been followed by the state courts. See People v. Colantone, 243 N. Y. 134, 152 N. E. 700; Lewis v. State, 89 Tex. Cr. R. 345, 231 S. W. 113; Mason v. Commonwealth, 209 Ky. 157, 272 S. W. 397.')"

In **Minner v. U. S.**, 8th Cir., 57 F. 2d 506, 513, the Court said:

"Finally, counsel for Minner maintain that the court erred in that portion of its general charge wherein he commented on the facts. The trial judge undertook to sum up and comment on the evidence. He narrated the important facts testified to by witnesses for the government but he wholly failed to sum up the evidence in behalf of Minner. His comments were in the nature of an argument to the jury rather than a fair and dispassionate statement of what the evidence showed and a tempered expression of his opinion as to the facts. In doing so, he assumed the role of an advocate rather than an impartial judge. That this was error is established by repeated decisions. Shaughnessy v. United States (C. C. A. 5), 17 F. (2d) 225; Sunderland v. United States (C. C. A. 8), 19 F. (2d) 202; Cook v. United States (C. C. A. 8), 18 F. (2d) 50; Cline v. United States (C. C. A. 8), 20 F. (2d) 494; Weare v. United States (C. C. A. 8), 1 F. (2d) 617; Rudd v. United States (C. C. A. 8), 173 F. 912; Wallace v. United States (C. C. A. 6), 291 F. 972; Hickory v. United States, 160 U. S. 408, 16 S. Ct. 327, 40 L. Ed. 474.

"In so holding we do not intend to limit the right of a trial judge to properly sum up the facts and express his opinion thereon. To do so is not only his right but, in many cases, his duty. As said by the court in Rudd v. United States (C. C. A. 8), 173 F. 912, 914:

"'A judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done.'

"But in summing up and commenting on the evidence, the trial judge should be governed by certain well recognized limitations inherent in the very nature of the judicial office. He should state the evidence fairly and accurately, both that which is favorable and that which is unfavorable to the accused. His statements should not be argumentative, but impartial, dispassionate, and judicial; and they should be so carefully guarded that the jurors are left free to exercise their independent judgment upon the facts.

"Reversed and remanded with instructions to grant Minner a new trial."

In **Bishop's New Criminal Procedure**, Vol. 2, 2nd Edition, page 816, the author says:

"In other words, the judge should state, not the general law of the subject, but the legal rules governing the facts in controversy—all of them not a part only—as the evidence tends to prove them; and his words should be interpreted and judged of, not in an abstract way, but with reference to those facts."

On the same point, Blashfield, in his work on instructions to juries, says:

"Abstract instructions should be applied to the case. The Trial Judge should not leave the jury to apply general principles of law to the case, but he should inform the jury what the law is as applied to the facts. However pertinent and applicable an instruction may be it is abstract unless made to apply in express terms to the facts of the case." **Blashfield's Instructions,** Vol. 1, Sec. 89, page 202.

Ruling Case Law states the rule thus:

> "It is elementary and thoroughly well settled in homicide cases as well as others that the Court must charge on every issue or theory having any support in the evidence. The instructions should distinctly set forth the law applicable not alone to the case as made by the evidence from the prosecution, but the case as made by all the evidence and especially the law applicable to any favorable evidence comprising defensive matter in behalf of the accused." **31 R. C. L., pp. 933-4.**

In **Boatright v. United States** (8th Cir.), 105 F. 2d 737, 739, the court said:

> "In this case, the court undertook to review what was designated as uncontroverted facts. In doing so, no mention whatever was made of any evidence favorable to the contention of the defendants, although there was such evidence in the record, and at least some of it stood uncontradicted. The charge is replete with repetitions and reiterations of evidence favorable to the Government, with no reference to any evidence favorable to the defendants."

After quoting from the charge, the court further said:

> "These quotations are simply given by way of illustration. The charge impresses us as being argumentative throughout. In fact, we can conceive of no more effective argument for the Government than that which characterizes the charge in this case. The judge narrated material and important facts testified to by Government witnesses and wove them into an argument that was clearly prejudicial. This, we think, requires a reversal in this case. Cook v. United States, 8 Cir., 18 F. 2d 50; Stokes v. United States, 8 Cir., 264 F. 18; Cline v. United States, 8 Cir., 20 F. 2d 494;

Hurwitz v. United States, 8 Cir., 299 F. 449; Weare v. United States, 8 Cir., 1 F. 2d 617; Rudd v. United States, 8 Cir., 173 F. 912; Minner v. United States, 10 Cir., 57 F. 2d 506, 513."

In **Hendrey v. U. S.**, 6th Cir., 233 Fed. 5, 18, the Court said:

"We have often approved the practice of declining to give instructions which, though proper in themselves, would constitute mere repetitions, usually in less intelligible form, of subject-matter consecutively and logically treated in the general charge but the respondents in a criminal case, no less than the parties in a civil case, are entitled of right to have clearly stated to the jury each distinct and important theory of defense, so that the jury may understand that theory and the essential rules applicable to it. We cannot avoid the conviction that the respondents' rights in these respects in this case were not sufficiently saved by the general charge."

The rule thus stated so clearly and succinctly by this Court in the Hendrey case is accorded practically universal recognition in both State and Federal Courts.

Quercia v. U. S., 289 U. S. 466;
Bird v. U. S., 180 U. S. 356, 357;
Williams v. U. S., 9th Cir., 93 F. 2d 685;
Schmeller v. U. S., 6th Cir., 143 F. 2d 544, 551;
Kinard v. U. S., Ct. of Appeals D. C., 96 F. 2d 523;
Thorwegan v. King, 111 U. S. 549.

In **Kinard v. U. S.**, supra, the Court said:

"The fact that in the present case there was other evidence highly persuasive of guilt of murder does not affect the applicability of the rule stated. As the court said in Stevenson v. United States, supra, 162 U. S. 313, at page 315, 16 S. Ct. 839, 40 L. Ed. 980:

'The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.'"

In Footnote 3 to the text in Stevenson v. U. S.. supra, it is stated that the rule set out by the United States Supreme Court in the Stevenson case has been followed by the State Courts.

In **Pearson v. State**, 143 Tenn. 385, 397, a case cited with approval by the United States Court of Appeals in **Krimer v. U. S.**, 11 F. 2d 722, and **Kinard v. U. S.**, supra, the Court said:

"The Court's charge is a safeguard of one accused and is his guarantee that his trial will be protected by all the rules of law established in experienced judicial procedure for securing a fair and impartial trial."

The Court in the Pearson case and in **Myers v. State**, 185 Tenn. 264, declared a defendant is entitled to a formal instruction upon each issue raised by the evidence.

In **Bird v. State**, supra, the Court said:

"It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal. The numerous decisions to this effect are cited in Wharton on Criminal Law, Vol. 3, Sec. 3162, 7th ed. The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the

other, and to bring into view the relations of the particular evidence adduced to the particular issues involved."

Approximately 279 pages of transcript of testimony are devoted to evidence submitted by the defense. Such a volume of testimony we think should deserve much fuller treatment at the hands of the Court. As stated in **Williams v. U. S.**, supra:

> "A Federal trial judge need not summarize the evidence at all. But if he undertakes to do so the summary must be fair and adequate. The authorities are agreed that it must not be one-sided." Quercia v. U. S., supra.

In **Commonwealth v. Jordan**, 328 Pa. 439, 196 Atlantic 10, 13, the Court said:

> "It is equally well settled that, where an alibi defense is presented, a failure, even in the absence of a specific request, to instruct the jury as to the degree of persuasion required is reversible error, for the reason that the jury is not furnished with a standard for determining the legal value of the evidence. 'The defendant had a right, even though no request was made for the instruction, to have the jury fully advised as to the difference between the burden resting upon the Commonwealth to establish guilt, and that resting on the defendant with respect to the alibi set up.' Commonwealth v. Andrews, supra, 234 Pa. 597, at page 604, 83 A. 412, 414."

In a criminal case a Court should instruct on all essential questions of law involved in the case whether requested or not.

Krimer v. U. S., 11 F. 2d 731;
People v. Odell, 230 N. Y. 481, 130 N. E. 619.

Sparks v. U. S., 241 F. 777, holds that a jury should be instructed as to the meaning of insolvency in a bank fraud case. (See also page 72 of the Opinion.)

McDonald v. U. S., 241 F. 793, holds that though the trial court is justified in refusing special requests that are not technically accurate, but where the request challenges the attention of the Court to the subject matter of the request, an instruction on the point covered should be given.

The principles stated in one and two above with respect to the duty of the court to charge both theories or to make a fair summation of the evidence where he summarized it at all are not only recognized in the authorities heretofore cited but are generally recognized in texts and in state and federal decisions and to such an extent that they may be said to be axiomatic and fundamental. For instance, in **Reid's Branson's on Instructions to Juries** it is said:

> "Where a positive instruction for the prosecution has been given, it is then proper that the converse of the proposition be given for the defendant." (Vol. 1, No. 1, page 19.)

The same text also states:

> "Where a charge ignores the theory of the defendant which is supported by evidence, there is reversible error." (Sec. 52, page 16.)

And also:

> "The rule requiring the court to instruct on all the theories of the case having support in the evidence to any extent has a like application to criminal prosecutions. The accused has a right to have the jury instructed on the whole law of the case." (Sec. 53, page 161.)

The attention of the Court is directed to the previous testimony of appellant that he did not intentionally overstate contributions made by him (App. 913a).

The sentence in this case was extremely severe. We recognize that this Court has no power over the sentence, yet a harsh sentence may justify the Court in reversing a case that would otherwise be affirmed. At any rate, such a sentence may turn the balance in favor of reversal.

U. S. v. Hoffman, 137 F. 2d 416, 422;
U. S. v. Trypuc, 136 F. 2d 900, 902;
Amendola v. U. S., 17 F. 2d 529, 530.

CONCLUSION.

It is not believed that the Court intended to repudiate the "claim of right" doctrine so deeply rooted in our federal tax system (**Lashelle's Estate v. Commissioner of Internal Revenue,** 6th Cir., 208 F. [2d] 430, 434, 435; **Commissioner v. Wilcox,** 327 U. S. 404, 407; **Healy v. Commissioner of Internal Revenue,** 345 U. S. 278; **In Re Ward,** 131 F. Supp. 387; and **Memphis Memorial Park v. McCann,** 133 F. Supp. 293). Such repudiation would be equivalent to an ex post facto rule that would make criminal practices theretofore followed by taxpayers under the advice of accountants and tax attorneys and recognized as legal in former decision of the Courts. At any rate, if this is to be done the extent of the modification of that doctrine and the limitations thereof should be clearly stated.

Regardless of the technical aspects of this doctrine the question of whether or not appellant intended to permanently convert to his own use funds belonging to the corporations was a question of fact to be determined by the jury and not a question of law for the Court.

Certain special requests supported by material evidence and not included in the general charge of the Court are set out in the appendix to this petition.

It is respectfully submitted that the petition for rehearing should be granted and the judgment of the trial court reversed and a new trial ordered for the appellant.

L. E. GWINN,
TAYLOR MALONE, JR.,
Attorneys for Appellant.

Certificate.

D. L. Jolly, Sr., appellant herein, by his attorney, L. E. Gwinn, certifies that, in his judgment, the foregoing petition for rehearing is well founded and is not interposed for delay.

.....
L. E. Gwinn,
Counsel for Appellant.

.....
D. L. Jolly, Sr.

APPENDIX.

Objections to refusals to give certain special requests and these requests are set out as follows:

Mr. Gwinn: Defendant excepts to the refusal to give Special Request Number 2, because it was not covered by the general charge of the Court, presents a rule of law established by the Supreme Court and the Court of Appeals for this Circuit that is in conflict with the constructive dividends recognized, applied, and given by the Court in his general charge. The rule in the Lashelle case and Wilcox case is applicable, and the charge on constructive dividends is in conflict with that rule.

(Said special request is as follows:)

3293 "Defendant's Special Request No. 2.

Refused, Boyd, J.

"At the request of the defendant, the Court instructs the jury that taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain, and (2) the absence of a definite unconditional obligation to repay or return that which would otherwise constitute a gain. The absence of an enforceable obligation to pay the money to someone else is only one of the two conditions necessary to constitute income. There must also exist a claim of right on the part of the taxpayer and unless you find and are satisfied from the proof beyond a reasonable doubt that the defendant received the proceeds of insurance collections arising out of claims for damages under a claim that he was entitled to such proceeds and also that there was no obligation on his part to repay to the corporations the sum so received, then these collections did not constitute income that should have been reported in his in-

dividual tax returns. What is said in respect to
3294 the insurance collections also applies to the collections for advertisements and other items received by defendant and deposited in his personal account."

Mr. Gwinn: The defendant excepts to the refusal of the Court to give Special Request Number 3, because it was strictly applicable to the facts, was material on the issue of intent, not covered in the general charge, and particularly points out something not indicated in the general instructions, that defendant, in the absence of facts and circumstances showing to the contrary, was justified in assuming that Wilkins and Payton complied with his instructions, and these instructions were material on the issue of intent, that is, the instructions given Wilkins and Payton.

(Said special request is as follows:)

3295 "Defendant's Special Request No. 3.
Refused, Boyd, J.

"At the request of the defendant the Court instructs the jury that if the defendant was entitled to withdraw funds from the corporation to be charged to his account and be repaid by him and he instructed Wilkins and Payton, Vice-Presidents, respectively, of the Jolly Cab Company and the Jolly Motor Livery Corporation, to turn over to him checks for insurance collections and for advertisements and make the proper bookkeeping entries, then you would not be justisfied in convicting him on account of the fact that he received such checks and deposited same to his personal bank account, and in the absence of any facts and circumstances showing the contrary, he would be justified in assuming that Wilkins and Payton complied with these instructions."

3296 Mr. Gwinn: Defendant excepts to the refusal of the Court to give Special Request Number 4, be-

cause it states a correct rule of law, known as the Cohan rule, supported by the cases cited in the footnotes to the instruction, and was not fully covered in the general instructions, though partially so.

(Said special request is as follows:)

"Defendant's Special Request No. 4.
Refused—Boyd, J.

"At the request of the defendant, the Court instructs the jury that it is the theory of the Government in this case that the defendant deliberately stated contributions that were not made and did so for the purpose of evading and defeating his income tax. If the proof shows that he intentionally padded the claimed deductions for contributions and that this was done willfully and with intent to defeat the payment of his income tax, he would be guilty, but the mere fact that he may have overstated the amount of such contributions would not of itself justify you
3297 in returning a verdict of guilty. In this connection, the Court instructs the jury that absolute certainty in claiming deductions for contributions is not required and if the defendant did not keep books and records from which the amount of such contributions could be determined with precision, then he would be justified in estimating the same, and if this estimate was honestly made you would not be justified in returning a verdict of guilty although the defendant was unable to support by proof the deductions claimed."

Mr. Gwinn: Defendant excepts to the refusal of the Court to give Special Request Number 5, because it was strictly applicable to the question of intent, and not covered in the general instructions of the Court, and related, not to an isolated bit of evidence, but to an entire line of evidence.

(Said special request is as follows:)

3298 "Defendant's Special Request No. 5.

Refused—Boyd, J.

"At the request of the defendant, the Court further instructs the jury as follows:

"Records which the defendant kept, or which were kept under his instructions, may be considered by you in determining whether there was a willful failure to report collections from insurance companies arising out of claims for damages filed against such companies. In this connection, the Court instructs the jury that, if checks representing such collections were deposited by the defendant in his bank account and sufficiently identified to enable an auditor, accountant, or Federal investigator to trace the source of these checks, and you further find that the defendant knew or had reason to believe that the deposit tickets would be examined by Government auditors in any investigation of his income tax returns, then you may consider the entries on such deposit tickets, made in the handwriting of the defendant, in determining
3299 whether the failure to report these collections was the result of an intentional fraud or was the result of error or mistake in the income tax returns."

26

No. 773

No. 12,412

Office - Supreme Court, U. S.
FILED
MAR 19 1956
HAROLD B. WILLEY, Clerk

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

D. L. JOLLY, SR.,
Appellant

VS.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

APPENDIX TO APPELLEE'S BRIEF

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FILED
SEP 6 - 1956
CARL W. REUSS, Clerk

The Daily News, Memphis, Tenn., 9/2/56—35c

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PART OF OPENING STATEMENT OF MR. FITZHUGH NOT COPIED IN APPELLANT'S APPENDIX

• • • • •

21 We will show the sources of his income. We will trace by Revenue Agents and by charts that will be assistance to you, and by evidence of the highest credibility, both personal proof and by exhibits and documentary proof, and we will show to you where the income came from, how the money consisting of income would come into the Cab Company or some to the subsidiary companies of his, and how the checks made payable to these companies would be taken out and placed in his own personal account, and no report on the income tax of these large sums of money that were diverted and siphoned off into his personal accounts.

Now, an example,—and I will be very brief here because I want you to hear the evidence, and I am merely summing up in a very brief fashion just a few high points of the Government's testimony, and the type of fraud that was committed here,—now, for instance, we will show that defendant Jolly deducted from his income taxes during the years '46, '47, '48 and '49 approximately fifteen thousand dollars in contributions which he did not make. Now, in some cases that contributions were made by other com-
22 panies, but they were deducted by the other companies. In other cases, nobody connected with—nobody in any of the companies made the contribution at all.

And we will show that these deductions were made at his direction, the whole thing was under his control, and his accountants and lawyers, and so forth, of which he had a good many, and has had all along, and still has,—all act-

*Numbers appearing in outer edge of text indicate page numbers of original stenographic transcript of testimony.

ing under his control, and he had full control of the whole situation as to what was deducted on income tax.

We will show, as an example, that the Boy Scouts, for instance,—a very fine organization,—that the sum of twelve hundred and fifty dollars was deducted during these years in question by the defendant Jolly, that he did not give a nickel to the Boy Scouts, and neither did any company he was connected with. We will also show that there was the Girl Scouts, there was two hundred and fifty dollars a year for the Girl Scouts, and no contribution made.

Now, he is solely responsible for making these deductions, made at his direction, and we intend to hold him responsible for it.

23 Now, another type,—there were various other types of deductions or tax evasions that took place during these years that amounted to a large amount,—the dividends, these large sums of dividends that came in, or earnings that came in that he did not report,—he siphoned off into his individual accounts.

Now, for instance, there is an item of auto property damage, some eleven thousand dollars. The defendant, Jolly, operated a taxicab company, as most of you know, and as most of you also know taxicabs get about pretty fast, and they have accidents from time to time, and very often, and there were a large number of these accidents over these years, and the cost of repairs made by the Jolly Maintenance Service, and so forth, were all deducted, cost of repairs to these cabs were deducted as repairs, which is a proper item of deductions under the income tax laws, but we also show that most of it was covered, or a large part of it was covered by insurance, and that also there were recov-

eries made from the people who were responsible for
24 these accidents and damage to the taxicabs, and we will show that insurance companies paid off, and instead of reporting that as income, which he should have done, those amounts were siphoned off into his personal account.

That the same thing applied to twelve thousand seven hundred dollars receipts by defendant Jolly during these taxable years for advertising. You have seen on taxicabs various taxicab ads, various companies' and people's ads, for instance. During these taxable years some twelve thousand seven hundred dollars was paid by these people for advertising. None of that was reported on defendant's income tax return.

Also, the same thing, he failed to report discounts he received on automotive equipment, amounting to some nine thousand dollars. Nor did he report some seven thousand dollars on refunds on group life insurance on the life of his employees.

None of that was reported on the income tax returns, and was withheld, and we feel show a deliberate evasion.

And, for example, there were various other items, but, as I said, I am just hitting the high spots. But Mr. Jolly owned some rental property.

25 He collected twenty-five hundred dollars in rents from the commercial rental property, and none of that was reported; it just went into his personal account.

And we will show that these amounts that went into his personal account, instead of being reported, were not reported. And furthermore, that this personal account that he had in one of the ledgers, the main account, that all that

money was accounted for in his own personal living expenses, and none went into business expenses.

Now, there is another example. During '47, '48, and '49 there are a good many direct expenses. He received a good many, belonged to a good many boards of directorate, and he would get a fee. These boards paid twenty dollars or fifty dollars an attendance. He would get these fees, and not report them as income, which, of course, he was required to do. These was a substantial amount of money and we will show he knew he was supposed to deduct them, because on the 1946 return he did deduct them—, I mean did report them as income, but '47, '48 and '49 he did not, and that was held back.

[26] Now, we will show to you evidence that will be clear and convincing, and we sincerely believe—, or this matter would not be presented to you here, that after you have heard all the proof, and the very reliable, high type of witnesses, unimpeachable witnesses, and some very unimpeachable, devastating documentary evidence that will be introduced from this witness stand,—we are convinced that you will feel that defendant is guilty, and will so make your verdict.

• • • • •

TESTIMONY OF CECIL DUDLEY HAYS

DIRECT EXAMINATION
BY MR. VADEN:

[41] MR. GWINN: You say that is the 1946 return? You say that is the 1946 return?

MR. VADEN: Yes, sir, if you will hand him Exhibit 1, now, so he will testify.

Testimony of Cecil Dudley Hays

Q. That is now Exhibit 1 to your testimony, Mr. Hays. Will you tell us who signed that return?

A. D. L. Jolly, Sr.

Q. And on what day?

A. March 15th, 1947.

Q. What date was it received in the Collector's Office? Does it have a stamp there?

A. March 15, 1947.

42 Q. Did anyone sign it besides Jolly?

A. No, sir, they did not.

Q. Was it prepared—, does it show anyone assisted in the preparation?

A. Bolin, Quinn & Ivy, by Quinn.

Q. Well, apparently—.

A. I can't get that initial.

Q. Apparently some firm of accountants, is that right?

A. Apparently some firm of accountants, is all I can say.

Q. Bolin, Quinn & Ivy?

A. Yes, sir.

Q. See, you have to talk loud, these fans are bad and all these people can't hear you. Now, Mr. Hays, how much income did he show? What was his net income in 1946?

A. $73,058.85.

Q. And how much income tax?

A. $37,295.53.

Q. Yes. Will you turn over to the schedule, page three, and see if there are any contributions claimed by the taxpayer in that return?

A. Yes, sir.

43 Q. Will you call them off?

A. It says to see—, let's see the schedule. Y. M. C. A., two hundred and fifty dollars. Red Cross, three hundred and fifty dollars. Southwestern, seven hundred—.

MR. VADEN: I can't hear you.

A. Southwestern.

MR. VADEN: Yes.

A. Seven hundred and fifty dollars. Gailor Hall, five hundred dollars. Highland Heights Presbyterian Church, ten fifty.

Q. You mean one thousand and fifty dollars?

A. One thousand and fifty dollars.

Q. Go ahead.

A. Boy Scouts, two hundred dollars. Girl Scouts, two hundred and fifty dollars. Goodfellows, three hundred and fifty dollars. Y. W. C. A., two hundred and fifty dollars. Methodist Church, Doniphan, Missouri, two hundred and fifty dollars. Community Fund, five hundred dollars. Totaling forty-seven hundred dollars.

Q. Four thousand—, forty-seven hundred?

A. Yes.

* * * * *

45 Q. Will you tell us who signed that return?

A. D. L. Jolly.

Q. On what day?

A. March 5th, 1948.

Q. Is there any other signature at the bottom, Mr. Hays?

A. Bolin, Quinn & Ivy, by Quinn.

Q. By Quinn. What was the taxable income on this 1947 return?

A. $58,991.04.

Q. What was the tax?

A. $24,455.76

Q. Now, I would like to ask you about some contributions, if you will look on page three.

A. Y. M. C. A., one thousand dollars. Memphis Union Mission, five hundred dollars. Father Lane, Gailor Hall, five hundred dollars. Highland Heights Presbyterian Church, one thousand five hundred dollars. Southwestern University, one thousand dollars. Red Cross, five hundred dollars. Boy Scouts, three hundred fifty dollars. Girl
46 Scouts, two hundred fifty dollars. Y.W.C.A., two hundred fifty dollars. Methodist Church, Doniphan, Missouri, two hundred fifty dollars. Salvation Army, two hundred fifty dollars. Community Fund, five hundred dollars. Goodfellows, five hundred dollars. Grimes Memorial Methodist Epworth Church, fifty dollars. I don't know if I—, it was Methodist Church at Doniphan, Missouri, two hundred fifty dollars. Salvation Army, three hundred dollars. I am not sure if I got that right.

Q. All right, sir, what is the total on that?

A. Total, seven thousand four hundred and fifty dollars.

Q. On the 1947 return?

A. 1947, yes sir.

* * * * *

47 Q. I believe that is a joint return, isn't it?

A. D. L., Sr. and Berenice Jolly.

Q. Now, who signed that return?

A. D. L. Jolly, Sr., and Berenice Jolly.

Q. On what day did they sign it?

A. 3-7-49.

Testimony of Cecil Dudley Hays

Q. Does it show there on the left hand corner any preparer on that one?

A. Signed by Bolin, Quinn & Ivy, by Quinn.

Q. Yes, sir. Now, in 1948, under that return, what was the taxable net income?

A. $49,453.90.

Q. And how much was the tax?

48 A. $12,481.88.

Q. Will you see if there are some contributions on that?

A. Girl Scouts, two hundred and fifty dollars, Y.M.C.A., one thousand dollars. Memphis Union Mission, five hundred dollars. Father Lane, Gailor Hall, five hundred dollars. Highland Heights Presbyterian Church, one thousand five hundred dollars. Southwestern University, one thousand dollars. Red Cross, five hundred dollars. Boy Scouts, three hundred and fifty dollars. Y.W.C.A., two hundred fifty dollars. Methodist Church, Doniphan, Missouri, two hundred fifty dollars. Salvation Army, three hundred dollars. Community Fund, five hundred dollars. Goodfellows, five hundred dollars.

Q. What was the total?

A. Seven thousand four hundred dollars.

* * * * *

49 Q. Is that a joint return, also?

A. Yes, it is, D. L., Sr., and Berenice Jolly.

Q. And both of them signed it?

A. D. L. Jolly, Sr., Berenice Jolly, yes, sir.

Q. On what day?

A. 3-10-50.

Q. Does it show any preparer's name on the left hand?

A. Bolin, Quinn & Ivy, by Quinn.

Testimony of Cecil Dudley Hays

Q. All right, sir. What is the taxable net income on that return?

A. $37,320.29.

Q. And what is the tax?

A. —$7,914.06.

50 Q. Now, let's see if there are some contributions on that one.

A. Girl Scouts, two hundred fifty dollars. Y.M.C.A., one thousand dollars. Memphis Union Mission, five hundred dollars. Highland Heights Presbyterian Church, one thousand five hundred dollars. Southwestern University, one thousand dollars. Red Cross, five hundred dollars. Boy Scouts, three hundred fifty dollars. Y.W.C.A., two hundred fifty dollars. Methodist Church, Doniphan, Missouri, two hundred fifty dollars. Salvation Army, five hundred dollars. Community Fund, five hundred dollars. Goodfellows, five hundred dollars. Miscellaneous, $47.31.

Q. What is the total on that?

A. $7,147.31.

• • • • •

54 Q. Now, will you tell us please what the taxable income—, what day was that signed, that is, what day did they sign that?

A. March 15th, 1951.

Q. And what was the taxable net income in 1950?

A. $37,038.45.

Q. And what was the tax?

A. $10,315.94.

Q. Do you have any deductions for contributions on that?

55 A. Highland Heights Presbyterian Church, $863.91.

Q. Is that the only deduction claimed?

A. It is, yes, sir.

• • • • •

58 THE COURT: And the Court would like to take occasion now to say that the indictment is legally sufficient.

MR. VADEN: Yes.

THE COURT: The indictment is legally sufficient.

MR. GWINN: I haven't challenged it.

• • • • •

59 Q. Now, on that return there appears Jolly Cab Company has a fiscal year. What month does it run to, or from what month?

A. June 1, 1945, to May 31, 1946.

60 Q. Yes, all right. And what was the taxable net income?

A. $35,643.00.

Q. And what was the tax?

A. The tax was $15,526.50. The capital value, $2846.44, making a total of $18,372.94.

• • • • •

61 MR. VADEN: We expect to show checks made to Jolly Cab Company, that did not go to Jolly Cab Company, but went in defendant's personal account.

THE COURT: All right.

• • • • •

63 Q. That is for the fiscal year 1947, is that right?

A. Ending May 31, 1947.

Q. Yes. What is the net income on that return?

A. $60,231.27.

Q. What is the tax total? You don't have to bust it up.

A. $15,159.70.

• • • • •

65 Q. That is for the fiscal year ending what date of that, Mr. Hays?

A. May 31, 1948.

Q. Yes. And what is the taxable net income?

A. $11,571.44.

Q. And how much tax?

A. $2,561.43.

Q. Incidentally, who signed that return?

A. D. L. Jolly, President.

• • • • •

68 Q. Will you tell us on that return how much the net tax is coming off of his loss?

A. $21,086.73.

Q. Yes, and who signed that return, please?

A. D. L. Jolly, President.

• • • • •

REDIRECT EXAMINATION
BY MR. VADEN:

90 Q. And that statement that Bolin, Quinn & Ivy put on there said that they put everything on the return about which they had any information, that is true?

A. Yes, sir, yes, sir.

• • • • •

TESTIMONY OF JOHN J. ROBERSON

DIRECT EXAMINATION
BY MR. JOYNER:

• • • • •

97 Q. And there purports to be addenda agreement of who as the officer of Jolly Cab Company or Jolly Motor Livery Service or Jolly Motor Livery Corporation?

A. Dave Jolly, President.

Q. And who executed or initialed or executed it for Jolly Motor Livery Corporation?

A. D. L. Jolly.

Q. Now, do you know how long this agreement was in effect between your company and Jolly Cab Company or Jolly Motor Livery Corporation?

A. Yes, sir.

Q. And how long was it?

98 A. It was terminated effective the first of this July, but was replaced by another piece of paper.

Q. All right. Now, during the years, '46, '47, '48 and '49, I ask you, sir, whether or not you had occasion to make payments under that contract?

A. Pardon me, may I make a correction. That particular agreement was terminated on June 8th, June, 1948, and one was replaced, similar agreement at that time, which has just now been terminated. Under the last one, there was no payments made. This was the one which was terminated back in June of '48.

Q. In June of '48?

A. Yes, sir.

• • • • •

TESTIMONY OF JACK PUMPHREY

DIRECT EXAMINATION
BY MR. VADEN:

• • • • •

112 Q. Now, did you bring the file along so you could tell us what it is for?

A. Yes.

Q. It appears to be draft for sixty-five dollars?

A. Yes, sir.

Q. What for?

A. That is for property damage for one of our assured and one of Mr. Jolly's cabs had an accident, May 3, 1950.

Q. The name of your assured is D. T. Lake?

A. That is right.

Q. Signed by your man named Keith Rogers?

A. That is right.

Q. What is he, some claim agent?

A. He is adjuster, and he was in this area at that time.

Q. Paid through the Middle Tennessee Bank, that is your bank?

A. That is right.

* * * * *

TESTIMONY OF DR. B. W. KENDALL

DIRECT EXAMINATION
BY MR. VADEN:

* * * * *

121 Q. Will you tell us whether or not you had any interest back in 1946 in the Yellow Cab Company, Incorporated, over there?

A. Yes, sir.

122 Q. What was it, were you an officer?

A. I am owner of it.

Q. You do?

A. Yes, sir.

Q. Owner. Will you tell us whether or not you brought over here in response to a subpoena the transaction you had with Jolly Cab Company of Memphis in May, 1946?

A. Yes, sir.

Q. What was that transaction? What was it about?

Testimony of Dr. B. W. Kendall

A. Sale—we bought an oil refining machine from Jolly Cab Company in '46.

Q. And how much did you pay for it?

A. Two hundred and fifty dollars. It was a second hand machine.

(Document examined by counsel)

Q. I ask you to look at this and tell us whether or not that is check you used to pay for it?

A. That is the one, yes, sir.

MR. VADEN: I would like to have that marked.

123 (Said photostat of the check was accordingly marked as Exhibit 1 to the testimony of Dr. Kendall, and same will be found among the exhibits hereto.)

Q. You are from what place, Doctor?

A. Columbia, South Carolina.

Q. You came over here in response to a subpoena?

A. Yes, sir, that is true.

Q. Two hundred and fifty dollars, is that right?

A. Yes, that is true.

Q. For an oil refinery—?

A. For an oil refiner, in other words, for a machine that you put the oil, burned oil that has been used in the cabs in to clean it.

Q. I see. And is that your signature on the check?

A. That is mine, yes, sir.

Q. This is the check book it came out of?

A. That is right.

MR. VADEN: I would like to have that shown to the jury, if Your Honor please. This is endorsed Jolly Cab Company, D. L. Jolly.

That is all.

* * * * *

TESTIMONY OF JOHN KLOTZ

DIRECT EXAMINATION
BY MR. JOYNER:

* * * * *

130 Q. But the memorandum which I have just read from accurately reflects the checks to Jolly Cab Company?

A. That is right. I have duplicate disbursement slips.

Q. Beg your pardon?

A. I have duplicate disbursement slips for the entire period.

* * * * *

CROSS EXAMINATION
BY MR. GWINN:

* * * * *

144 Q. And I believe you stated that they would have no record except when whoever received your checks?

A. Well, they would receive a copy of this disbursement statement that goes along with the check.

Q. That is when the check was sent?

A. Yes, sir, one of these.

* * * * *

REDIRECT EXAMINATION
BY MR. JOYNER:

146 Q. The result of it is that you all paid the Jolly Cab Company or Jolly's Motor Livery Company something in the neighborhood of $12,700.00 in this four year period, that is correct, isn't it?

A. I would say in round figures, yes, sir.

* * * * *

TESTIMONY OF HERBERT E. FITZGERALD

DIRECT EXAMINATION
BY MR. JOYNER:

• • • • •

150 Q. I don't know, Mr. Fitzgerald, but have you had occasion to run a total on these nine checks amounting to—, yes, $2,034.50,—and if all payments were made pursuant to a fleet discount agreement, is that correct?

A. Yes, sir.

• • • • •

TESTIMONY OF JOHN MADDOX

DIRECT EXAMINATION
BY MR. JOYNER:

• • • • •

153 Q. And, we have issued a subpoena for you to bring here some thirteen odd checks payable by your company to the Jolly Cab Company for the period April 29, 1947, to February 4, 1949. Do you have those with you?

154 A. I believe you have photostatic copies of our checks.

Q. All right, sir, I will pass those to you. And did you bring the originals?

A. We don't have the originals, sir.

Q. All right, will you look these over and see if you can identify them, please?

(Documents examined by witness)

A. Yes, sir.

MR. JOYNER: All right, pass those to me, Mr. Berg. Or pass them to Mr. Gwinn so he can be looking at them.

Q. Now, there are thirteen of them there, sir, and did you have occasion to run a total on what they amount to?

Testimony of James T. Bland

A. I added them up and they are right around sixty-four or sixty-five hundred dollars, roughly.

MR. JOYNER: Well, we get $6,345.15, which is pretty close.

A. I just did it in my mind, sir.

MR. GWINN: Did it very well.

155 MR. JOYNER: Unusually.

Q. I presume, sir, that the Chrysler Company has a contract for fleet discounts similar to other large automobile manufacturers?

A. Very similar.

Q. I ask you whether or not these payments were made pursuant to one of those agreements of that type?

A. They were.

Q. And to the Jolly Cab Company?

A. Yes, sir.

* * * * *

TESTIMONY OF JAMES T. BLAND

REDIRECT EXAMINATION

BY MR. JOYNER:

* * * * *

160 Q. You are assistant superintendent of claims, and you are here in response to this subpoena to bring certain checks, if you have them,—you are here in response to Government subpoena to bring certain checks, if you have them, of U. S. F. & G., payable to Jolly's Motor Livery Corporation, or the Jolly Cab Company, during the period May 3, 1946, through November 2, 1949, totaling some twenty-four in number?

A. Yes, sir.

* * * * *

185 Q. Now, particularly, with reference to an item on
186 or about May 3, 1946, a payment of thirty-five dollars to the Jolly's Motor Livery Corporation, at that time did you have records at your company reflecting that payment?

A. Yes, sir.

Q. And is your recollection based on the refreshment you have now given it that such a payment was made?

A. Yes, sir.

Q. Now, further, on January 7, 1947, was there an item of twenty-five dollars to the Jolly's Cab Company?

A. Yes, sir.

Q. Now, sir, I would direct your attention to the date of February 12, 1947, an item of one hundred and fifty-five dollars. Do you have any record there about that item?

A. No, all of our regular records have been destroyed.

MR. JOYNER: Yes, sir.

A. (Continuing)—I have my notation from my search that such a payment was made.

Q. And was it made to the Jolly Cab Company?

A. Yes, sir.

• • • • •

188 Q. I think, Mr. Bland, on the next item, is one Mr. Gwinn has already asked you about, dated approximately May 16, 1947, in the amount of $424.58?

A. Yes, sir.

Q. What do you have on that?

A. There is a photostat of the draft.

MR. JOYNER: All right, we would like to have that marked as Exhibit 1 to his testimony, and have it passed to the jury.

(Said document was accordingly marked as Exhibit 1 to the testimony of Mr. Bland, and same will be found among the exhibits hereto.) (Said Exhibit 1 was accordingly passed to the jury for examination.)

Q. Now, sir, the next one I have listed is dated about May 22, 1947. The amount is thirty dollars. What do you have on that? If you have a photostat, that is all we will need, Mr. Bland.

A. No, it is not here.

189 MR. JOYNER: All right.

A. (Continuing) I don't believe I have any record on that.

Q. All right, let's pass to the next one. It is item dated June 30, 1947, in the amount of fifteen dollars. What have you on that?

A. Fifteen dollars?

MR. JOYNER: Yes, sir.

A. I have an experience card record showing that we made a payment on—.

THE COURT: Will you speak a little louder, Mr. Witness, I can't hear.

A. I say, we have an experience record card showing a payment was made in June, 1947, of fifteen dollars to Jolly Cab Company.

MR. JOYNER: All right, may I have that experience card marked Exhibit 2 to his testimony.

(Said document was accordingly marked as Exhibit 2 to the testimony of Mr. Bland, and same will be found among the exhibits hereto.)

190 Q. The next I show is August 15, 1947, fifteen dollars, to the Jolly Cab Company.

A. I don't have any record on that at all.

Q. How about on November 19, 1947,—what about that?

A. I show a payment of five dollars, according to this record, on November 14, 1947, to Jolly's Motor Livery.

• • • • •

TESTIMONY OF CLIFFORD PIERCE

DIRECT EXAMINATION
BY MR. VADEN:

• • • • •

204 Q. And the $7.50 appears to be payment of some kind of claim, then, to Jolly Cab Company. Do you have the original draft there?

A. Yes.

Q. It went through the bank?

A. Yes.

Q. Was it endorsed Jolly Cab, Inc., or Jolly Cab Company by Jolly?

A. Yes.

MR. VADEN: I would like for the jury to see both of them.

(Exhibits passed to the jury for examination.)

Q. Will you tell us whether or not the file discloses those were claims made by some Jolly Cab Company upon some assured upon which these companies had the insurance?

A. Yes.

• • • • •

TESTIMONY OF ANN M. KEENAN

DIRECT EXAMINATION
BY MR. JOYNER:

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221 Q. Did I ask you from whom you rented the property?

A. From Mr. Dave Jolly.

Q. Personally?

A. Yes, sir.

Q. It wasn't some company he was connected with?

A. No, sir.

Q. It was from him, is that right?

A. Yes, sir.

Q. Are the checks drawn to him?

A. Yes, sir.

Q. Miss Keenan, I am just hastily checking over these, and it is apparent you have one check here for each month from January of '46 to June of '47, each payable to Dave Jolly in the amount of twenty-five dollars, is that correct?

A. That is correct.

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TESTIMONY OF MRS. EVELYN WEST

DIRECT EXAMINATION
BY MR. JOYNER:

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262 Q. Were you in that property and paying rent on it during March of '48?

A. Yes, sir.

Q. And any later date than that?

A. No, sir.

Q. That was the last, was it?

A. Yes.

Q. And what I have here are the various receipts and checks that you paid your fifty dollars per month rent?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

MR. JOYNER: All right.

(Documents examined by counsel.)

Q. Now, Mrs. West, I have here a group of your originals which I will return to you, and I would like to get the photostats marked as exhibits to your testimony, and have them passed to the jury.

Now, Mrs. West, this was for your occupancy of the upstairs of 215 Union, is that correct?

A. Yes, sir.

263 Q. And you were there some twenty-seven or eight months, something like that?

A. Approximately.

Q. You paid a total of thirteen hundred fifty dollars, is that correct?

A. Yes, sir, as far as I know.

* * * * *

TESTIMONY OF GORDON MORRIS

REDIRECT EXAMINATION

BY MR. FITZHUGH:

300 Q. If Mr. Jolly or anyone else had given three hundred and fifty dollars a year over the space of four or five years to the organization, you would know about it, wouldn't you?

301 A. I would think I would, yes, sir.

* * * * *

TESTIMONY OF ALLEN RUSSELL

DIRECT EXAMINATION
BY MR. JOYNER:

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310 Q. I would like to inquire into another item involving payment by your company on July 24, 1947, to the Jolly Cab Company, a check drawn on the First National Bank. It has got on it Cont. CA 3476958, and for your stub, "Return Deposit $1,600.00".

A. Yes, sir.

311 Q. What was that for, please, sir?

A. These were reporting form policies where a deposit premium had been paid, and when the policy was cancelled, we returned whatever deposit remained to the Jolly Cab Company.

Q. That is, in a sense, unearned premium, is that right?

A. No, it was on a policy which you have to report each month the premium involved in place of deposit premium, and that deposit was returned when the policy was cancelled.

Q. Do you have the original check on that now?

A. Yes, sir, I do.

Q. Will you pass that in and let us examine it, please? Here is the original on that, and I am going to ask that photostat be marked the next numbered exhibit to your testimony.

(Said photostatic copy of check was accordingly marked as Exhibit 2 to the testimony of Mr. Russell, and same will be found among the exhibits hereto.)

Q. So the two items, the $1,600.00, and these others make a total of some $3,700.00 paid to Jolly by your

312 drafts, and that is approximately, and I take it your bank does not pay those drafts unless they are authorized to, unless they come back with correct and proper endorsement, is that right?

A. That is correct.

• • • • •

TESTIMONY OF MERWIN McCOY

DIRECT EXAMINATION
BY MR. VADEN:

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321 Q. Now, it appears, Mr. McCoy, on the drafts, your drafts, they cleared through the company's bank, at some bank, at the company's home in Maryland, is that true?

A. Yes.

Q. Signed by your agency manager,—you had at one time a Mr. Daley as manager?

A. Yes, sir.

Q. Do you remember him?

A. Yes, sir, he is still with the company.

Q. He is still with the company, not manager?

A. Yes, sir.

Q. Not manager. You pay these along, you pay that, there were accounts $11.00, $12.50, $124.77, $230.97,
322 $14.00, $13.50, $10.17, $23.27, $17.50, and $15.52?

A. Yes, sir.

Q. As we understand it, if one of your assured, — and have the name on it, and the numbers of the claim, were involved with a Jolly Taxicab, Jolly Cab Company makes a claim —.

A. Demand just like anybody else.

Q. And you investigate it, and the adjustor, too, and if you think the assured is liable, you pay it off?

A. Yes, that is right.

* * * * *

TESTIMONY OF A. L. HOGAN

DIRECT EXAMINATION

BY MR. VADEN:

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378 Q. I ask you to look at this piece of paper and tell me if that is photostat of one of your checks?

A. (Document examined by witness) Yes, sir.

Q. Do you know what that was for?

A. It was for some car that one of my trucks hit that belonged to Mr. Jolly.

Q. How much is it for?

A. $49.95.

Q. On a bank up at Kennett?

A. Yes, sir.

Q. $49.95. Who is it payable to?

A. Jolly Cab Company, — Jolly's Motor Service.

* * * * *

TESTIMONY OF MRS. MARGARET BENCE

DIRECT EXAMINATION

BY MR. JOYNER:

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381 Q. I see. We have issued subpoena for your company to bring up here some sixteen-odd forty dollar checks payable to Jolly's Motor Livery, for rental on
382 parking space between November 6, 1946, and March 1, 1948. Did the company rent such space from Jolly's Motor Livery?

A. Yes.

Q. Do you have those with you?

A. Yes, sir.

* * * * *

TESTIMONY OF CLIFFORD R. ELDRED

DIRECT EXAMINATION

BY MR. JOYNER:

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390 Q. We have asked particularly for some seven drafts totaling $570.29. Do you have the original of those with you?

A. Yes, sir.

* * * * *

391 Q. Now, Mr. Eldred, I believe in each case these drafts or checks were payable to the Jolly Cab Company, were they?

A. That is correct.

Q. They subsequently cleared your bank, and the money of your company was paid out on them?

A. That is right.

Q. And as I understand it, they were paid by your company on behalf of an assured of your company for damages done to vehicles belonging to Jolly Cab Company?

392 A. Property damage cases, yes, sir.

* * * * *

TESTIMONY OF WOODROW NORVELL

DIRECT EXAMINATION

BY MR. VADEN:

* * * * *

412 Q. Now, Mr. Norvell, this appears to be a series of Home Indemnity drafts, $17.50, $20.00, $7.50, $107.76,

$8.00, all to the Jolly Cab Company, and I believe one of them Jolly's Motor Livery, and all endorsed Jolly Cab Company, D. L. Jolly.

I would like to show those to the jury.

You represent Great American, you say?

A. Yes, sir.

Q. I believe, Mr. Norvell, these drafts signed by you —, no, I believe —, have you a Mr. W. Wright Mitchell, W. Wright Mitchell was an attorney in your office at one time?

A. Yes.

Q. Still practicing before this bar?

A. Yes, sir.

413 Q. All seem to have the name and date and place of the accident, — Monroe Street, — the name of the assured, that is on each draft, isn't it, the name of the assured and where the accident happened?

A. Yes.

Q. Look at those and see if they are all signed by you?

A. Yes, each of these drafts were actually issued in our office.

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TESTIMONY OF FRANK ZAHNER

DIRECT EXAMINATION

BY MR. VADEN:

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439 Q. But anyway, it says rent upstairs 215 Union Avenue?

440 A. Yes, that is correct.

Q. Your office—, your business is downstairs?

A. It was at the time. We are now in a different building at 255 Union.

Q. I have one here in August of '48, fifty dollars; July of '48, fifty dollars; May 3rd, '48, fifty dollars; April 8th, 1948, fifty dollars; June 3rd, 1948, fifty dollars. There are five days off one month. Five months rent at fifty dollars?

A. Yes, sir.

• • • • •

TESTIMONY OF O. F. WALLER

DIRECT EXAMINATION
BY MR. FITZHUGH:

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549 Q. Do you recall back in '46, in February, Mr. J. D. Bobbitt, his younger son had an accident with a taxi company?

A. Yes.

Q. A taxicab, and there was damage?

A. Yes.

Q. How much was the amount of that damage?

A. Sixty dollars, I believe.

• • • • •

550 Q. This sixty dollar check was sent to Jolly Cab, was it?

A. We made the check out to Bobbitt, and he endorsed it, and I believe sent that to Jolly Cab Company.

• • • • •

TESTIMONY OF WALLACE N. COLLINS

DIRECT EXAMINATION
BY MR. JOYNER:

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571 Q. I ask you whether back in '48 your wife took some driving lessons?

A. She did.

Q. To drive an automobile?

A. Yes, sir.

Q. Who did she take them from?

A. Jolly's Motor Livery, I believe it was, at that time.

Q. Did you get a bill for those driving lessons?

A. Yes, sir.

Q. How much was it?

A. $4.03.

Q. Did you pay it?

A. Yes.

• • • • •

TESTIMONY OF C. L. SPRINGFIELD

DIRECT EXAMINATION
BY MR. VADEN:

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606 Q. In the year 1949, did you find the sum of one thousand dollars?

A. Couldn't find it, no, sir.

Q. Jolly Cab, Jolly, Jr., or Jolly anybody?

A. No, sir.

Q. In the year 1948, did you find the sum of one thousand dollars?

A. No, sir.

Q. By any of those parties?

A. No, sir.

Q. And in the year 1947, did you find the sum of one thousand dollars?

A. No, sir.

Q. And on Jolly, Sr., in the year '46, in the personal

name D. L. Jolly, Sr., did you find the sum of fifteen hundred dollars?

A. No, sir, not any personal name.

• • • • •

TESTIMONY OF HAROLD G. STEVENS

DIRECT EXAMINATION

BY MR. FITZHUGH:

822 Q. With whom are you connected?

A. Dixie Greyhound Lines.

Q. Do you recall a claim made against your company about November, 1948, relative to damage to an automobile, by the Jolly Motor Livery Corporation?

A. Yes, sir.

823 Q. And did you pay a claim on that case?

A. Yes, sir.

Q. Do you have the original check?

A. Yes, sir.

Q. Will you produce it, please?

And hand both of these to Mr. Gwinn over there.

(Documents examined by counsel.)

MR. FITZHUGH: Will you hand the original to the witness, please, Mr. Berg?

Q. This check, I believe, is in the sum of $83.54, is that correct?

A. That is right.

Q. And made payable to Jolly's Motor Livery, and W. C. Mosley, and H. L. Lewis?

A. Yes, sir.

Q. Endorsed by Jolly's Motor Livery, by D. L. Jolly, is that correct, and the other two named payees?

A. Yes, sir, endorsed by D. L. Jolly and the other two named payees.

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TESTIMONY OF MRS. JULIUS LEVY

DIRECT EXAMINATION

BY MR. FITZHUGH:

830 Q. You are Mrs. Julius Levy?

A. That is right.

Q. I will ask you to state whether or not in 1947 and 1949, you took some drivers lessons from the Jolly's Motor Livery Corporation?

A. That is right.

Q. And I will hand you a letter to refresh you. Do you have the checks in payment of those?

A. Yes, I have.

• • • • •

831 Q. In any event, these three checks, one for $37.50, one for $11.59, one for $5.11, made payable to Jolly's—, one of them to Jolly Cab Company, and the other two to Jolly's Motor Livery, were paid by you for drivers lessons?

A. That is right.

• • • • •

TESTIMONY OF D. L. JOLLY, SR.

CROSS EXAMINATION

BY MR. VADEN:

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2448 Q. But you did get estimates to send to some claim agent or attorney representing the insurance company, did you not?

A. Yes, sir.

2449 Q. And did you make some record of that somewhere when you send it out?

A. Record the estimate?

MR. VADEN: Yes.

A. It was made on the insurance report.

Q. Yes. And Mr. Wilkins had instructions to give you copies of them, and I guess, as you said, he kept a copy at Jolly's Maintenance?

A. Yes.

• • • • •

2477 Q. Mr. Jolly, on yesterday we were discussing the question of your depositing these checks in the bank over at the Bank of Commerce, and we had pretty well talked up the matter of insurance companies paying for claims, and things like that, and you had given your reasons for why you did this, and I have one or two other little matters to ask you about on checks.

For instance, I have exhibits two here to a man named Russell, Treadwell and Harry. Do you remember that sixteen hundred dollar check?

A. Yes, sir.

Q. It appears from his testimony you got on some kind of insurance deal out there, and it fell through, that Jolly Cab Company paid him the money, and then he rebated it.

2478 That is really what happened, wasn't it, sent it back?

A. I don't recall really what happened on that occasion.

Q. This sixteen hundred dollars, you weren't afraid some cab driver was going to get hold of it and run it through the cashier, were you?

A. No, it was placed on my desk, and I presumed the proper bookkeeping had been done.

Q. Who placed it there?

A. I don't know who placed it there, while I was out of my office.

* * * * *

2481 Q. Somebody just mysteriously placed this on your desk, and you did not know what, and just put it in your account?

A. That is right.

Q. Five thousand dollars, fifty-four hundred dollars in two years? I see.

Well, Corbitt Motor Company for some rent, a bunch of checks. You weren't afraid some of these cab drivers were going to get hold of these checks and run them
2482 through on your own cashier against you, were you? Why didn't you report those?

A. I did my best to estimate those checks, and I thought was taken care of on the miscellaneous, things that I knew I might have overlooked.

Q. Somebody just mysteriously put those on your desk every month, you didn't know what they are?

Q. Who are they made out to?

MR. VADEN: Dave Jolly.

A. I presume they were sent to me direct.

Q. Sent to you personally?

A. Yes. How much are they for?

Q. Twenty-five dollars apiece. Why didn't you report it?

A. It is just one of those things I neglected to report.

* * * * *

2483 Q. That is nothing whatsoever—?

A. I talked to Mr. Quinn several occasions about

variations on what 1099's and what my record showed, and I think reported all of the 1099's.

• • • • •

2492 Q. This was the cab company money, and it went in the account, wasn't it?

A. I can see the top check there.

Q. Well, I don't want to hold anything from you. Will you pass those, Mr. Marshal?

A. Yes, these are all Cab Company checks.

Q. Yes. And it went in your personal bank account? Now, it is your testimony this morning, that somebody placed these on your desk, and you presumed every-

2493 thing was all right?

A. Yes, sir.

Q. Somebody else opened the mail and took them out, and threw the envelope away, and just placed the bare check on your desk, and you thought—, and that happened a dozen times here, I guess it is, and every time you thought everything was all right?

A. Yes, sir.

Q. Chrysler Motors, the first one appears to be $967.40.

• • • • •

2500 Q. You saw, and was present there, some evidence from a man from International Harvester?

And, they have been shown in here. What is the gentleman's name? Several hundred dollars in checks from International Harvester. A kick-back to you. I believe they were made to Jolly's Motor Livery, then?

A. Yes, sir.

Q. They went into your personal bank account? Why didn't you report those?

2501 A. They were placed on my desk or handed to me by someone in the office, and I thought the bookkeeping had been done on them.

• • • • •

2503 Q. And did you furnish them a list of all these checks you were putting into your personal bank account down at National Bank of Commerce?

A. No, sir.

• • • • •

2506 Q. Well, you opened a lot of it yourself, you did, didn't you?

A. Personal mail they put on my desk, yes.

Q. You said yesterday you opened many of them, opened mail and threw the envelope away, you said that?

A. I did not tell you I threw the envelope away. I just slit the envelope and laid it back, to be helpful.

Q. Just to help your staff, you just slit the envelope open, but did not look, is that it?

A. No, sir.

Q. I see. If you instructed Mr. Payton, what you were doing was to instruct the very person who was never elected by the Directors, we agree on that, don't we? To see that the proper entries were made about your money, is that what you say?

A. Yes, sir.

Q. You yourself did not instruct Mrs. Jones, the bookkeeper, about any of this?

2507 A. No, sir.

Q. As a matter of fact, she did not know anything about it, did she?

A. No, sir.

Q. Why didn't she know something about it?

A. I don't know.

Q. Four years —.

MR. GWINN: If Your Honor please, I object to that question. It is purely argumentative, and calls for conclusions.

THE COURT: Well, he can't answer for her, why she did not know something about it. And the objection to that extent is sustained.

MR. VADEN: Yes, sir.

Q. Your testimony is that during four years in question here, and your further testimony is several years before, 1946, that these entries all went on down there, and you never told your own bookkeeper about it, is that right?

A. I don't remember testifying to that yesterday.

2508 Q. Well, did you talk to any bookkeeping department about it?

A. No.

MR. VADEN: All right.

A. (Continuing)—Other than Mr. Payton and Mr. Wilkins.

MR. VADEN: All right.

A. (Continuing)—They are both supposed to have bookkeeping experience.

Q. They were? Were they supposed to be educated bookkeepers?

A. They went through high school, and I did not.

Q. They both testified, and there is no disrepute about driving a cab, but they both testified they started working by driving cabs, that is true, isn't it?

A. Mr. Payton testified he started with me as a cab driver. Mr. Wilkins was a filling station attendant.

Q. All right. There is no disreupte about that. But you say they were highly educated bookkeepers, and they used to do this stuff there, didn't you?

2509 A. I did not think they were highly educated bookkeepers, but they knew much more about it than I did. I did not know anything about it.

• • • • •

2511 Q. Mr. Wilkins was down here on Court Avenue?

A. Yes, sir.

Q. And he was supposed to see that the books down at 110 South Second, — that that money was handled properly on the books?

A. Wilkins had a whole crew of bookkeepers of his own.

Q. Down on Court Avenue?

A. Yes.

Q. I understand. But Jolly Cab was not kept down on Court Avenue, was it?

A. Some of it was.

• • • • •

2516 Q. Did you not get the profits out of the cigarette machine and put them in your personal bank account?

A. Yes, sir.

Q. It was put in for their convenience, was it not?

2517 A. Put in to keep them from wandering off down the street there on my time.

Q. That is right, put in there to keep them from wandering off down the street and to buy cigarettes elsewhere, and you put the profits in your personal bank account?

A. Those checks were placed on my desk, or handed to me, just like the others.

* * * * *

2518 Q. Yes. You did not happen to get that amount of interest and director's fees by happening to see that those charts, or the heading up there about the amount of interest each year, or interest and director's fees, did you?

A. No, sir.

Q. Now, you say that the commissions were rent. In the first place, Mr. Jolly, you testified that you did give these written memorandums in your handwriting to

2519 Mr. Quinn every year. That is true, isn't it?

A. Yes.

Q. As a matter of fact, you did, for a long number of years prior to '46, the same system?

A. At his suggestion, yes.

Q. And Mr. Gwinn interrogated Mr. Quinn to some great length about why he did not inquire of you about, for instance, commissions, do you know that—you well know that many C. P. A.'s make these returns out every year all over the United States, don't you?

A. I presume that they do, yes.

Q. Many lawyers make them out, also, for their clients, that is true, isn't it?

A. I presume so.

Q. And many other public accountants. And, as a matter of fact, you can go down to the drug store and a man has got a card up, income taxes prepared, — you know that generally, do you not?

2520 A. I never saw that, no, sir.

MR. GWINN: I did not get that.

A. I never saw a sign in a drug store.

Testimony of D. L. Jolly, Sr.

Q. Come down to Third and McLemore this coming year, and you will see a man with a little table, with a little placard, and he will make them out.

Now, you think a man who made some twenty years, or twenty-five years, — twenty, anyway. Do you think that Mr. Quinn ought to interrogate you, or his other clients, if others, and get you to tell where you got all these items?

A. He never asked me to.

Q. Do you know other C.P.A.'s who makes clients tell where they got money in the bank, or do they have some system of doing that that you know of?

A. Not that I know of.

• • • • •

2539 Q. Or even which window at which bank?

A. No, sir.

Q. You can't recollect whether you gave them big bills or little bills ?

A. No, sir.

Q. Well, do you know when you walked in, — it occurred, was it fall or winter?

A. No, sir.

Q. Summer, or when?

A. No, sir. I don't recall that either.

Q. Was anybody with you when you bought this?

A. Not that I know of, no, sir.

Q. Well, suppose it could have been in your own bank. Can you tell us the name, know the name of the tellers in those banks? Can you tell me the name of the teller, if you don't remember anything else?

A. No, sir.

Testimony of D. L. Jolly, Sr.

Q. So, in '46, — let's get this straight, — we might as well do it all, when doing it, — see, that chart says '47, five hundred dollars. Did you do it that year, too?

2540 A. Yes, sir.

Q. You see that chart, '48, five hundred dollars. Did you do it that year, too?

A. Yes, sir.

Q. You see that chart, 1949, five hundred dollars. Did you do it that year, too?

A. Yes, sir.

• • • • •

2547 Q. Do you have one cancelled check in '46, '47, '48, and '49, to Southwestern, in the amount of seven hundred and fifty, one thousand, one thousand?

A. No, sir.

• • • • •

2549 Q. Yes. And on the Red Cross, did you even ask the bank where you bought the exchange to give you any kind of receipt?

2550 A. No, sir.

• • • • •

2554 Q. How much?

A. About one hundred dollars.

Q. You personally gave the Boy Scouts troop of Highland Heights Presbyterian Church about one hundred dollars each year?

A. Yes.

Q. Did you attend their meetings?

A. Some of them, yes, sir.

Q. Was it currency?

A. Yes, sir.

• • • • •

2577 Q. I will ask you whether that year you made any donations to the Girl Scouts?

A. I don't know now. I presume I did.

Q. You did not list it?

2578 A. Is that the report, for that year?

Q. No, '50 I am talking about, did you make any for '50 yourself?

A. Is that the return for that year?

Q. Well, this is '49?

A. Well,—.

Q. Well, I will put it down. I don't want to confuse you.

A. All right.

• • • • •

2580 Q. Now, the Brown Distributing Company, which we have inquired a little bit about, showed a profit of some thirty-two hundred dollars in the year it operated, didn't it?

A. I don't know.

Q. Showed a profit?

A. I don't know.

Q. Now, you did not report any profit on Brown Distributing Company, did you?

A. I never was given any figures on it. Mr. Brown, who was handling the books,—by his testimony, you read that here.

Q. Your own bookkeeper, Mr. Brown, who was han-

dling the business in his name, and it was your money, wasn't it?

A. Yes.

Q. And he opened the account up at your request?

A. Yes, sir.

Q. The bank account, and you introduced him at the bank, on the back of the signature card?

2581 A. Yes.

Q. He didn't tell you we made or lost money out of the company, but you don't know whether to report it or not, is that right?

A. Not that I recall. I think the first report I had was when the business was liquidating, and there was no further use for it.

• • • • •

2585 Q. Did anybody down there—, going to give away the money on donations at the Jolly Cab Company, except you?

A. Well, I approved the—.

MR. VADEN: That is right.

A. (Continuing)—Approved the donation.

• • • • •

2597 Q. So, as I understand the defense to this lawsuit, somebody was mixing up some checks, and you gave instructions they were to be turned over to you personally, and you took them down to the National Bank of Commerce and made out a deposit slip to D. L. Jolly, and put them in there, that is true?

A. Yes, sir.

Q. They were Cab Company money, that is true?

A. Most of it, yes.

Q. Sold some kind of machine, and an oil filter, to some fellow way up in Carolina for two hundred and fifty dollars, didn't you, and put that in your bank account, didn't you?

2598 A. Yes, sir, is was placed on my desk there when it came in.

• • • • •

TESTIMONY OF MRS. KATHRYN JONES

DIRECT EXAMINATION
BY MR. GWINN:

• • • • •

2738 Q. You have never made deposit slips for him?

A. No, sir.

Q. For his personal account?

A. No.

• • • • •

CROSS EXAMINATION
BY MR. VADEN:

• • • • •

2784 Q. And you issued the check of Jolly Cab, and for the Jolly Cab, on various accounts?

A. Yes. If you will notice, you will see it is charged through the journal for those various accounts.

• • • • •

TESTIMONY OF CHARLES L. ANDREWS

CROSS EXAMINATION
BY MR. FITZHUGH:

• • • • •

2841 Q. And you took it out of the porter's wages, I suppose.

2842 Did you know that that check, made payable to Jolly Cab Company, was paid into Mr. Jolly's personal account?

A. No, sir, I did not.

MR. FITZHUGH: The record shows it was.

You might hand him that, Mr. Marshal.

Q. I hand you what purports to be a deposit ticket to Mr. Jolly's personal account, and see if C. L. Andrews Cotton Company check is not on there?

A. Yes, sir.

• • • • •

REDIRECT EXAMINATION
BY MR. GWINN:

Q. Mr. Andrews, from what you knew of Mr. Jolly then, and from what you know of him now, you would not have suspected that he would intentionally take—?

2843 MR. FITZHUGH: Now, if the Court please,—

THE COURT: Just a minute.

MR. FITZHUGH: Yes, we object to such a question.

THE COURT: Just a moment. So far, it sounds like the question is not proper.

Is it, Mr. Gwinn?

MR. GWINN: It is proper in my judgment, or I would not be asking it.

MR. FITZHUGH: There is only (one) way, as Your Honor knows, that reputation can be established, and that is by the three general questions.

THE COURT: The witnesss was introduced as a

character witness, now, and counsel did ask him about the specific item there.

The question,— reframe it. It did not sound like a proper question to the Court.

• • • • •

FURTHER TESTIMONY OF MRS. KATHRYN JONES
CROSS EXAMINATION
BY MR. VADEN:

• • • • •

2849 Q. Mrs. Jones, on this question of this unlimited discretion that you say you had about charging down there, you did have unlimited discretion about deciding, as Mr. Gwinn said, which way you should charge this?

A. I think I told you that when in doubt I checked with Mr. Payton or Mr. Quinn as to where the proper place was.

Q. So, if there was any doubt, you checked with Mr. Quinn there.

Well, I want to ask you how you determined matters like these? Maybe Mr. Payton told you, or something. You can tell us.

• • • • •

2857 Q. And you were giving him statements of his personal account every two or three months, as well?

A. No, sir, I did not. Well, when he would come ask me how much he owed, I would tell him, or whether he had any due him, I would tell him.

Q. And that happened every two or three months?

A. Maybe so.

• • • • •

Further Testimony of Mrs. Kathryn Jones

2858 Q. And you haven't talked to Mr. Minor, the auditor here?

A. Not about Mr. Jolly's personal account, no, sir.

Q. You haven't talked to Mr. Jolly himself about this matter?

A. Not his personal, no, sir.

Q. Not personal business, ever since this happened in '51, and gave this statement, you haven't talked about it?

A. Not the personal part. The business part, I have, but not the personal part.

Q. They talked about Jolly Cab Company, Jolly's Motor Livery, Car Clinic, talked about all these things, but never mentioned the personal affairs one way or another?

A. It was not any of my business.

• • • • •

2862 Q. I understand that, also. But, what I am getting at is this.

If—, see, put that on, "if", and that way it won't be a burden to you,—if you had been told by Mr. Payton, or anybody else,—not Mr. Jolly,—we are not going to get him mixed up in this,—that all these checks were to be charged,—just got one bundle of them,—to proper accounts on the books of Jolly Cab Company, and the Motor Livery, wherever, you would have done so, wouldn't you?

A. I would have.

2863 And if—, see, I am still keeping you out of it,—if you had been told to charge them on Mr. Jolly's personal account by Mr. Payton or Mr. Wilkins, you would have done so, wouldn't you?

A. I would.

• • • • •

EXHIBITS

Many of the exhibits are referred to and described in the appendices; however, appellee may wish to refer to some or all of said exhibits in brief at greater length. All of said exhibits are on file with the Clerk of this Court, having been duly transmitted to him by the Clerk of the District Court.

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336297—56——1

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 773

D. L. JOLLY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 2) is reported at 229 F. 2d 180.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1956, and a petition for rehearing was denied February 18, 1956. The petition for certiorari was filed on March 19, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED

Whether the trial court committed prejudicial errors of commission or omission in instructing the jury.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., § 145.)

STATEMENT

On May 22, 1953, petitioner was indicted in the United States District Court for the Middle District of Tennessee on four counts of wilful attempted evasion of individual income taxes for the years 1946 through 1949, in violation of § 145 (b) of the Internal Revenue Code of 1939, and two counts of presenting false claims against the United States in connection with the income taxes of the Jolly Cab Company, in violation of

18 U. S. C. § 287. (R. 4a–7a.)[1] After a jury trial, beginning on June 28, 1954, and ending on July 15, 1954, petitioner was found not guilty on Count 6 (Count 5 previously having been dismissed) and guilty on the first four counts, relating to his individual returns. (R. 1205a.) Petitioner was fined $10,000 on each count and sentenced to five years imprisonment on each count, the sentences on Counts 1 and 2 to run concurrently and the sentences on Counts 3 and 4 to run concurrently, a total of ten years. (R. 1205a–1206a.)

The indictment alleged that the amounts of net income and income tax declared by petitioner in his individual returns compared with the true amounts as follows (R. 4a–6a):

Indictment year	Net income		Income tax	
	Reported	Corrected	Reported	Corrected
1946	$66,831.34	$79,507.03	$27,295.53	$40,751.94
1947	50,004.03	72,524.99	24,455.76	40,802.73
1948	41,251.69	60,546.08	12,481.88	27,179.14
1949	30,903.82	50,545.18	7,914.06	17,091.13
Total	188,990.68	272,123.28	82,147.23	131,824.94

The evidence to support the verdict, the sufficiency of which is not challenged, may be summarized as follows:

During the years 1946 through 1949, petitioner was the owner of various enterprises including

[1] The record consists of five printed volumes comprising the appendices to the briefs in the Court of Appeals. The appellant's appendix is numbered 1a through 1239a; the Government's appendix, 1b through 48b.

two corporations known as the Jolly Cab Company and the Jolly Motor Livery Corporation. Some of the capital stock was issued in the names of his wife and son in accordance with the advice of his accountant. (R. 407a–408a, 927a, 942a, 1072a.) The Jolly Cab Company operated a fleet of taxicabs, and the Jolly Motor Livery Corporation engaged in the renting of cars and trucks. (R. 339a.) The books of both corporations were kept by an employee at the office of the Jolly Motor Livery Corporation. (R. 416a, 420a, 1024a.) Petitioner appointed Wilkins and Payton vice presidents of both corporations and made them office managers of Jolly Cab Company and Jolly Motor Livery Corporation, respectively. (R. 335a, 356a, 360a, 404a–405a, 442a–443a, 928a.) Wilkins opened the mail of Jolly Cab Company and turned over the invoices and statements to the bookkeeper and the checks to petitioner. (R. 361a–362a.) He gave no instructions to the bookkeeper as to the keeping of the books, nor did he have anything to do with them. (R. 364a–365a, 367a.) The mail received at Jolly Motor Livery Corporation was opened by petitioner and Payton. Payton, under petitioner's instructions, turned over to the bookkeeper all checks received in payment of accounts receivable but gave other checks to the petitioner. (R. 411a–412a, 427a, 1028a.)

The evidence established that petitioner, over the four-year period in question, had claimed

$14,550 of false deductions for charitable contributions, had failed to report $56,095.16 in checks made payable to the two corporations but deposited in his personal bank accounts, and had also failed to report $12,487.44 of miscellaneous income items. (R. 684a–710a.)[2] Although the corporation checks represented income to the corporations, none of the $56,095.16 was recorded on the corporation books or reported in the corpora-

[2] The details of the unreported income are as follows:

Informal dividends from Jolly Cab Co.:		
Reimbursements for casualty damages	$10,962.57	
Advertising receipts	12,757.68	
Rental receipts	400.00	
Rebates on purchases of cabs	9,114.23	
Taxicab receipts	140.74	
Insurance refunds and dividends	7,044.00	
Proceeds from sale of parts	1,424.31	
Reimbursements and refunds of expenses	1,746.88	
Proceeds from sale of real estate	1,750.00	
Miscellaneous other diversions	133.51	
		$45,473.92
Informal dividends from Jolly Motor Livery Corp.:		
Reimbursements for casualty damages	2,207.44	
Auto and truck rentals	65.01	
Rental receipts	3,070.00	
Receipts from driving lessons	337.12	
Rebates on purchases of equipment	3,691.63	
Proceeds from sale of truck	400.00	
Proceeds from sale of parts, etc	850.04	
		10,621.24
Total informal dividends from corporations		56,095.16
Other unreported income:		
Income from proprietorships		3,488.24
Rentals on property owned by petitioner		2,485.90
Interest income		4,257.30
Director's fees		1,540.00
Capital gain		716.00
False deductions for charitable contributions		14,550.00
Total unreported income		83,132.60

tion income tax returns. (R. 695a.) All of the returns were prepared by a certified public accountant. (R. 495a.) He prepared the individual returns from information submitted to him by petitioner, did not examine the petitioner's personal bank account, and never made a detailed audit of the corporations because he was not hired to do so. (R. 453a–467a, 493a, 502a–503a, 543a–545a.) He had no knowledge of the diversions. (R. 547a, 550a.) Payton was aware of them, having learned of the matter in 1944 or 1945, but never told the certified public accountant because he feared he might lose his job. Wilkins learned about the diversions from Payton in 1949 when petitioner, claiming that the companies were losing money, cut off the 5% bonuses Wilkins and Payton had been receiving out of the net profits of both corporations. When Wilkins and Payton pointed out to petitioner in 1949 that the corporation records were erroneous in that they did not reflect the diversions, petitioner became angry and advised them that those items were being reported as income on his individual returns. (R. 336a–337a, 344a–350a, 370a, 423a–424a, 426a–430a, 443a.)

Petitioner admitted at the trial that the checks payable to the corporations had been turned over to him and deposited in his personal bank account and that the money was later used to build up savings accounts and for other personal pur-

poses. He testified that he knew nothing about books or income tax returns, and signed them without reading them; that he had instructed Wilkins and Payton to turn certain checks over to him but to see that proper bookkeeping was done; that it was his understanding that whenever he took corporation checks they were supposed to be charged to his personal account; that he had not intended to take any money that he did not think he was entitled to; that he "was ready to pay them at any time presented, if they had been presented"; and that it was not until January 1951, after the Government's investigation began, that he learned these items had not been recorded on the books.[3] Petitioner also denied that he had willfully overstated his deductions for charitable contributions. (R. 33b–36b, 890a–896a, 898a–899a, 904a–905a, 913a–919a, 934a–938a.)

In his 1950 individual income tax return, filed two months after the Treasury agents' investigation began, petitioner reported as dividends the amounts he had diverted from his corporations during that year. (R. 10b, 21a–22a, 480a–483a, 669a, 776a, 791a–793a, 864a.)

[3] Although petitioner's trial did not take place until three and one-half years later in 1954, no evidence was adduced that he had ever caused the proper entries to be made, or had ever repaid any of the money, or had any intention of doing so.

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ARGUMENT

1. Petitioner advances general contentions (Pet. 18, 23–25) to the effect that the charge to the jury was unfair, inconsistent, and misleading. Because these contentions go to the charge as a whole, and because petitioner does not point out the specific passages to which he objects, we deem it unnecessary to argue them. We submit that there is no basis for these claims and that a reading of the charge (R. 1169a–1193a) will demonstrate that it was entirely fair and fully protected petitioner's rights.[4]

2. More specifically, petitioner contends (Pet. 18–22, 26–29) that the charge was one-sided in that the court refused petitioner's requests for certain instructions embodying petitioner's defenses. Petitioner relies in particular on the court's refusal of his requests #2 and #3. (Pet 26–29.) Both requests, it should be noted, relate exclusively to the $56,095.16 diverted by petitioner from the two corporations, and have nothing to do with the $27,037.44 of unreported in-

[4] Petitioner also contends (Pet. 24) that the court assumed as facts material matters not in evidence. The only example he gives (Pet. 25), however, is that the court "apparently" assumed that petitioner operated taxicabs and collected fares when the court charged the jury that if any such amounts were diverted by petitioner to his own use they would constitute constructive dividends taxable to him (R. 1180). Aside from the fact that the amount involved is only $140.74 (R. 688a), it is obvious that petitioner, as president and owner of the Jolly Cab Co., had access to the gross receipts without personally collecting them from customers.

come attributable to other items. (See *supra*, p. 5, and fn. 2.)

a. Under the instruction sought by petitioner's request #2, the jury would have been directed that "[t]he absence of an enforceable obligation to pay the money to someone else is only one of the two conditions necessary to constitute income" and that "[t]here must also exist a claim of right on the part of the taxpayer * * *" (Pet. 28–29, 31–32.) Concededly this instruction derives from *Commissioner* v. *Wilcox*, 327 U. S. 404. The petitioner states (Pet. 27): "Petitioner's Special Request No. 2 was based squarely on the Wilcox case * * *." The *Wilcox* decision, however, is plainly not in point here.

The Court held in *Wilcox* that embezzled funds were not taxable to the embezzler, a mere employee of the company involved, on the ground that he received the money "without any semblance of a bona fide claim of right" and was "under an unqualified duty and obligation to repay the money." (327 U. S., pp. 408, 409.) This Court has specifically limited the holding in *Wilcox* to the particular facts of that case. *Rutkin* v. *United States*, 343 U. S. 130, 138. The facts in the instant case (pp. 3–7, *supra*) are entirely different. The proceeds of the checks diverted by petitioner did not constitute embezzled funds for the purpose of application of

the *Wilcox* doctrine. *Currier* v. *United States*, 166 F. 2d 346, 348 (C. A. 1st); *United Mercantile Agencies, Inc.* v. *Commissioner*, 23 T. C. 1105, 1110, 1112, and cases cited. Where, as here, a controlling stockholder diverts corporate funds to his own use, the question of whether they constitute income to him is controlled not by the *Wilcox* doctrine but rather by the test laid down in *Rutkin* v. *United States*, *supra*. *Kann* v. *Commissioner*, 210 F. 2d 247, 249–251 (C. A. 3d), certiorari denied, 347 U. S. 967. Cf. *United States* v. *Bruswitz*, 219 F. 2d 59, 61 (C. A. 2d); *Davis* v. *United States*, 226 F. 2d 331, 334 (C. A. 6th). And under *Rutkin* (343 U. S., p. 137) a gain is taxable "when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it."

We submit that the trial court was correct in refusing to give the instruction sought by petitioner in his request #2.

b. The court also correctly refused petitioner's request #3. (Pet. 29.) The instruction sought by this request was directed to the question of petitioner's criminal intent in failing to report the $56,095.16 diverted by petitioner from the two corporations. (Pet. 17–18, 32.) The gist of the instruction was that, if the jury found that petitioner had directed Wilkins and Payton to "make the proper bookkeeping entries," then the jury "would not be justified in convicting him on account of the fact that he received such

checks and deposited same to his personal bank account, and in the absence of any facts and circumstances showing the contrary, he would be justified in assuming that Wilkins and Payton complied with these instructions." In excepting to the court's refusal to give this instruction, defense counsel argued that petitioner "could not be found guilty for failure to include these constructive dividends in his tax report unless he knew or should have known that they constituted income * * *." (Pet. 17–18.)

But the court had already fully instructed the jury as to the requirement of wilfulness. (R. 1173a, 1174–1175a, 1184a–1185a.) And in doing so the court had specifically warned: "It is necessary that a person making a willful attempt have knowledge of his tax obligations and have knowledge that such obligations exceed the amount being reported by him in his returns."[8]

[8] The context of the court's statement is as follows (R. 1173a, 1174a–1175a):

"The attempt to evade and defeat the tax, as stated, must be a willful attempt; that is to say, it must be made with intent to deprive the Government of the tax imposed by law which it was the duty of the defendant to pay to the Government. The attempt, I say, again, must be willful; that is, intentionally done with a bad purpose and an evil intent that the Government should be defrauded of taxes due from the defendant.

* * * * *

"To the end that you will fully understand, the Court instructs you the requirement that an attempt to evade taxes be shown to have been willful, or willfully done, means that you must pass, to some extent, on the mental state of the defendant at the time the alleged attempt, or attempts, oc-

Viewed in its most favorable light, the instruction sought by petitioner's request #3 was merely cumulative in nature and was properly refused. *Coffin* v. *United States*, 162 U. S. 664, 672. Once the court has given a correct charge, the extent of its amplification is largely in the court's discretion. *United States* v. *Bayer*, 331 U. S. 532, 536. Similarly within the court's discretion is the exact wording of the charge. *Coffin* v. *United States, supra; United States* v. *General Motors Corp.*, 121 F. 2d 376, 409 (C. A. 7th), certiorari denied, 314 U. S. 618; *Butler* v. *United States*, 197 F. 2d 561, 564 (C. A. 10th).

Here there were particularly compelling reasons for the court's rejection of the requested instruction. Even assuming that petitioner had in fact directed Wilkins and Payton to "make proper bookkeeping entries," and even assuming

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curred; that is, at the time of the filing of the returns. Willfulness, as I say, is largely a matter of intention. There must be a wrongful intent in the defendant's mind before he can be found guilty of willfully attempting to evade taxes. *It is necessary that a person making a willful attempt have knowledge of his tax obligations and have knowledge that such obligations exceed the amount being reported by him in his returns.* The mere fact that a taxpayer knew he had income he did not report and did not pay tax on, even though he might have known a tax was due, is not in and of itself sufficient to constitute a violation of the law here involved. There must be a willful and positive commission of an act, or acts, and an intention to evade the tax. Of course, the question of the defendant's intent is for you to decide, taking into consideration all of the facts and circumstances shown in the evidence." [Italics added.]

that petitioner was justified in relying on Wilkins and Payton to carry out those directions, it would still have been inaccurate to tell the jury that it "would not be justified in convicting him on account of the fact that he received such checks and deposited same to his personal bank account." For example, if petitioner deliberately withheld from his accountant (who prepared the tax returns in question) the facts relating to the funds diverted from the two corporations, and if petitioner did so for the purpose of tax evasion, the requirement of wilfulness would be satisfied notwithstanding any directions given by petitioner to Wilcox and Payton. (R. 1184a–1185a.) The question of whether petitioner possessed the necessary criminal intent must be resolved, as the trial court correctly stated in his charge to the jury (R. 1175a), by "taking into consideration all of the facts and circumstances shown in the evidence"—not merely the evidence isolated and emphasized by petitioner. See *Coffin* v. *United States, supra,* p. 675. Cf. *Perovich* v. *United States,* 205 U. S. 86, 92; *Bird* v. *United States,* 187 U. S. 118, 130–131. The requested instruction is also objectionable in that it is based, not upon the law applicable to the case, but upon the inferences to be drawn from the evidence, a matter peculiarly within the jury's province. *Coffin* v. *United States, supra,* p. 674. Cf. *Holland* v. *United States,* 348 U. S. 121, 141.

3. Petitioner further contends (Pet. 25–26) that the trial court erred in failing to submit to the jury the question "[w]hether the funds withdrawn from the corporations [by petitioner] were loans, advances, overdrafts, or dividends * * *" (Pet. 25).[6] However, this contention, which apparently comes as an afterthought to petitioner, is not open on review here. In the district court, although represented by able counsel, petitioner did not ask for such an instruction. Nor did he object to the trial court's failure to give such an instruction. Apart from his reliance on the doctrine of the *Wilcox* case, which is inapplicable here for the reasons stated *supra,* petitioner did not challenge the taxability of the diverted funds for civil purposes and concentrated his attack on the question of petitioner's criminal intent in failing to report the funds as income. Under Rule 30, Federal Rules of Criminal Procedure, "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his

[6] Petitioner complains (Pet. 26) that the court told the jury "over and over again that these funds constituted constructive dividends that should have been reported by petitioner. * * *" Actually, the instruction was that if they found that such items were diverted by him to his own personal use they would represent income to him in the form of constructive dividends. (R. 1178a–1180a.)

objection." See also, e. g., *Goldsby* v. *United States*, 160 U. S. 70, 77.

Indeed, not only was there no objection to the trial court's charge in this respect, but also the record in this case presents no real issue as to the nature of the diverted funds. Although the trial lasted for two and a half weeks and resulted in 3,300 pages of typewritten transcript, there is completely lacking any evidence of a defense theory that the funds were in fact loans. Petitioner's theory was, instead, that at the time he took the checks he *thought* that they were being charged to his personal account and that hence he did not *willfully* fail to report the money as income. Petitioner's own testimony was to this effect.[7] And in the entire closing argument to the jury by defense counsel, which covers 86 pages of the transcript (Tr. 3127–3213), there is not a single reference to the theory now espoused by petitioner.[8] Under these circum-

[7] See Statement, *supra*, pp. 6–7.

[8] If anything, the effect of the closing argument was to rule out any such theory. Defense counsel stated (Tr. 3183–3184):

"Don't you think that Jolly had a right to rely on Wilkins and Payton carrying out his instructions? *And if they had carried out those instructions, and these had been charged to him, we might have some question of constructive dividends.*

"*Well, I am not going into that subject.* It is complicated. So far as I know, it has not been passed upon by the United States Supreme Court. The Commissioner's rulings or some Tax Court decisions will get into the Supreme Court ultimately, because the ruling of the Commissioner, as I under-

stances, the trial court surely was not obliged *sua sponte* to embody such a theory in his charge to the jury.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

MAY 1956.

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stand the law, is in direct conflict with the decisions of the Supreme Court on other matters.

"But, regardless of that, I am asking you, as fair-minded men and women, not wanting to do any injustice to your fellow citizen,—if he didn't have a moral right to rely upon men in his employment, when he had no reason to doubt their integrity, to carry out his instructions." [*Italics* added.]

U. S. GOVERNMENT PRINTING OFFICE: 1956

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 773.

D. L. JOLLY, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY

To Brief for the United States in Opposition.

Conceiving that the Brief of the Government in Opposition is predicated on a false premise, ingeniously presented, we feel justified in making a short reply to that Brief.

It is insisted by opposing counsel (Br. 15-16) that "there is completely lacking any evidence of a defense theory that the funds (the so-called diverted checks) were in fact

loans." In making this statement, the attorneys for the Government either inadvertently overlooked or disregarded the undisputed facts and the established law. Under the method of bookkeeping set up by the auditor Quinn (a Government witness) the petitioner, when he obtained funds from the corporations, did not execute notes therefor, but these were charged to him as overdrafts, or as accounts receivable and paid promptly when such amounts were called to his attention, whether the amounts were large or small (R. 898a-900a; 904a, 905a, 1033a). On this point, Mr. Jolly thus testified on cross-examination:

"Q. But, be that as it may, your instructions were to see that the proper entries were made?

A. Yes, sir.

Q. To Mr. Payton and Mr. Wilkins?

A. Yes, sir."

* * * * * * * *

"Q. All right. Well, was this some dividends you were drawing, money that you were drawing out of your own company, really, when you get down to it, and didn't you understand, too, that was all this money—did you intend that to be dividends that you were drawing out of your own company?

A. Well, no, I would consider it more as——
I would consider it more as——

Q. All right.

A. (Continuing) ——Overdraft on the companies.

Q. I see. Kind of an overdraft?

A. Yes.

Q. And Mr. Gwinn on direct examination asked you yesterday, if this had been charged to you, were you entirely solvent and able to pay it all back, and you said you were?

A. Yes, sir.

Q. If called upon, I believe was the words you used?

A. I believe so.

Q. Who was going to call on you to pay it back? Was Jolly, the president, going to call on Jolly, the individual, to pay it back?

A. No, these things were handled by Mr. Quinn, the auditor. If he thought I had too much drawn in advance on the company, he would suggest that I replace it out of my own funds" (R. 950a-951a).

These overdrafts were not only in the nature of loans creating an obligation to pay, **but implied a promise to pay. Blacks Law Dictionary** (3rd Ed.), page 1309; 9 C. J. S. 703.

The attorneys for the Government (Br. 14-15) invoke Rule 30, Federal Rules of Criminal Procedure, and in support thereof state the following in the footnote to page 14:

> "Petitioner complains (Pet. 26) that the court told the jury 'over and over again that these funds constituted constructive dividends that should have been reported by petitioner. * * *' Actually, the instruction was that if they found that such items were diverted by him to his own personal use they would represent income to him in the form of constructive dividends (R. 1178a-1180a)."

Assuming that the instruction should be interpreted in the light of previous rulings of the court, it is clear of doubt that the statement "the court told the jury 'over and over again that these funds constituted constructive dividends that should have been reported by petitioner'" was substantially if not mathematically correct. In express terms, the court had told the jury that the checks in question constituted income, making this statement three times on a single page of the record (R. 64a).

We think the exception of petitioner (R. 1195a-1196a), when considered in connection with the Special Requests which were refused (R. 1198a, etc.), constituted a sufficient

compliance with Rule 30, Federal Rules of Criminal Procedure. But, be that as it may, the clear invasion of the province of the jury by the court was so serious an error[1] as to justify the application of Rule 52 (b), Federal Rules of Criminal Procedure, which provides "plain errors or defects affecting the substantial rights of the defendant (may be noticed) although they were not brought to the attention of the court." Rule 52 (b) is to be construed in pari materia with Rule 30. **Ryles v. U. S.** (10th Cir.), 172 F. 2d 72.

We know of no more serious error under our system of jurisprudence than the usurpation of the functions of the jury by the trial judge.

Moreover, in the charge itself the court gave the following instruction to the jury without stating any tests or furnishing any guide by which its finding should be determined.

> "You are instructed that you may find the defendant's deposits of unreported sales receipts of the corporations, or rebates, discounts and insurance damage claims to his personal bank accounts in the National Bank of Commerce, Union Planters Bank and Trust Company and the Leader Federal Savings and Loan Association represent his own taxable income, either wholly or to the extent of his stockholding in the corporation.
>
> "You may find that approximately one hundred per cent of the unreported corporate sales receipts or receipts from other sources deposited in the taxpayer's personal bank account in the previously named banks were received by the defendant as a constructive dividend despite the fact that no formal dividend was declared by the corporations" (R. 1180a).

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[1] See authorities cited in Sec. 11, p. 25, of the petition for certiorari.

The court did not submit to the jury under appropriate instructions the question of whether the so-called "diverted checks" stated by the trial judge to be (R. 1174a) the principal fraud alleged under the first four counts of the indictment constituted constructive dividends, but, to all intents and purposes, determined that question for himself. Any doubt on that proposition will disappear when consideration is had of the portion of the charge quoted above when considered in the light of its context.

It is recognized by this court in U. S. v. Atkinson, 297 U. S. 157, 160, that the court of its own motion may notice errors that "seriously affect the fairness, integrity or public **reputation** of judicial proceedings."

In view of the theretofore unblemished **reputation** of petitioner, the whole conduct of the trial in the instant case, the extremely severe sentence imposed—one in which so far as we have been able to discover is only equaled or exceeded by that given Al Capone with his dark and sinister background—we think the court might well take judicial notice of the effect upon the **reputation** of judicial proceedings by the conviction and sentence imposed upon petitioner. At any rate, the petition should not be denied on technicalities.

Respectfully submitted,

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